SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 460.

HIRAM REMINGTON,
Plaintiff in Error,
vs.
CENTRAL PACIFIC RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

The plaintiff in error is a citizen and resident of the Northern District of New York, residing in Jefferson County, one of the northern tier of counties of the State (Record, p. 57).

The Central Pacific Railroad Company, the defendant in error, is a California corporation, and

in July, 1899, transferred all its business and property of every kind to the Central Pacific Railway Company, a corporation of the State of Utah (See Appendix to Brief, p. 1), under the provisions of the so-called Central Pacific Readjustment, which was carried out in pursuance of the provisions of the Act of Congress of July 7, 1898 (30 U. S. Stat., p. 659). Since the 29th day of July, 1899, the Central Pacific Railroad Company has done no business of any kind in the State of New York or elsewhere, and has had no property of any description either in the State of New York or anywhere else (Record, pp. 74, 103).

The amount involved is more than two thousand dollars exclusive of interest and costs. The case therefore has the requisite conditions of citizenship and amount involved to make it removable to the federal court for trial.

On April 10, 1903, this action was begun in the Supreme Court of the State of New York, County of Jefferson, by the service of the summons only in the City of New York upon J. C. Stubbs, at the time a director of the defendant residing in Chicago, who was in New York City for a few days on business in no way connected with the defendant (Record, p. 74).

No complaint has ever been served in the case The time of the defendant to plead or answer had therefore never begun to run and its time to remove the case was under the Removal Act until its time to file some pleading in opposition to the complaint had expired.

The summons itself did not disclose whether the action was removable into the federal court (Record, p. 70). No diversity of citizenship was shown upon its face. The amount claimed by the plaintiff did not appear from the summons, and the defendant had no knowledge or information and no means of ascertaining whether the action involved the sum of two thousand dollars, exclusive of interest and costs (the jurisdictional amount required by the Removal Act).

The defendant, not being advised by the summons or otherwise, that the case was one which under the statutes it had the right to remove and try in the federal court, appeared *specially* in the state court, and on May 11, 1903, served a notice of motion to set aside the service of the summons (Record, pp. 69 and 70). No general appearance in the state court was ever entered for the defendant. The motion to set aside the service of the summons was heard by the state

court, and eventually decided against the defendant, and an order entered denying the motion on October 2, 1903 (Record, pp. 29 and 71).

On October 15, 1903, an appeal to the Appellate Division of the New York Supreme Court for the Fourth Department was taken from the order of October 2, 1903 (Record, p. 28), and thereafter and on October 16, 1903, a notice of motion to stay proceedings in the action, pending the appeal, was served upon the plaintiff's attorneys. This motion was returnable October 24, 1903 (Record p. 25).

After said appeal had been taken by the defendant from the order denying the motion to set aside the service of the summons, and after the motion to stay proceedings, the attorneys for the plaintiff on October 19, 1903, obtained an order for the examination of the plaintiff before trial (Record p. 80). This *ex parte* order for the examination of the plaintiff was served upon the attorney for the defendant on October 23, 1903, together with an affidavit of the plaintiff, verified the 16th day of October, 1903, in which the character of the action and the amount demanded by the plaintiff, viz, $414,492.64 was for the first time disclosed (Record p. 102).

The cause of action of the plaintiff was apparently based upon certain stock speculations made by him in 1879 or 1880, which had not turned out successfully. As he says he entered into these stock speculations by reason of certain articles in regard to the Central Pacific Railroad Company which appeared in Poor's Manual in 1879 and 1880, which articles he learned twenty years or more afterward, viz, in the month of December 1902, were untrue (Record pp. 61 and 81).

The defendant as promptly as possible after it was advised by the affidavit of the plaintiff that the case was a removable one, in that it involved more than two thousand dollars, exclusive of interest and costs, filed its petition and bond for the removal of the case to the federal court. It could not have been removed before, because it did not before appear from the record to be a removable case as it was held by this Court in *Powers* v. *Railroad Co.*, 169 U. S. 92, 100, that "so long as there does not appear of record to be any removable controversy, *no party* can be entitled to remove it."

The defendant was not required to remove the case as soon as it did, for the reason that its time to do so did not expire until the time came under

the State practice for it to file some pleading in opposition to the complaint, and the complaint had not and has not yet been served in the case at bar. The defendant removed the case as soon as it became a removable case, because it preferred to try it in the federal courts and not because it was under any obligation to then act in the matter.

Upon the return of the motion of the defendant to stay proceedings, pending the appeal in the state court (notice of which motion had been served on the plaintiff on October 16, 1903, after the appeal to the Appellate Division had been taken, and prior to the receipt of any information by the defendant to the effect that the case was one which could be removed to the federal court), the court, upon the application of the attorney for the defendant, relieved the defendant from a default as to its general appearance (not in its time to answer) (Record, p. 24), which occurred under the following circumstances, to wit:

> After the argument in the state court of the motion to set aside the service of the summons, Mr. Purcell, the attorney who had entire charge of the case for the defendant, was taken seriously ill, and was obliged to

go to New York City and there be operated on at a hospital. He was still ill in October, 1903, suffering from the effects of the operation, and unable to give his usual attention to business. When the motion to set aside the service of the summons was denied, Mr. Purcell, the defendant's attorney, assumed that he had, by stipulation from the attorneys for the plaintiff, twenty days after the entry of the order denying the motion, in which to appear generally in the case, if, in the meantime, it should be determined by him to be best not to appeal. It subsequently transpired, after the appeal had been taken, that the extension of time in which to appear generally, which the defendant had obtained, *was for ten days instead of twenty days*, and the defendant was as a matter of fact in default in appearing (not answering) at the time the notice of appeal was served, and for the period from the 12th day of October to the 15th day of October (Record, p. 102). This default in appearing (not answering) was of course at once relieved by the court and no opposition was made by counsel for the plaintiff. The order relieving the defendant from its default in appearing was entered in the clerk's office at Watertown on the 26th day of October, 1903, and upon the same

date a petition and bond were filed in accordance with the provisions of the statutes of the United States for the removal of cases to the federal court (Record, pp. 71–72).

After the removal of this action to the United States Circuit Court for the Northern District of New York, an order was obtained directing the plaintiff to show cause as to why the service of the summons should not be set aside. The order to show cause also extended the time of the defendant to enter a general appearance until twenty days after the determination of the motion arising upon the order to show cause (Record, pp. 73–74).

Upon the return day of said order to show cause, the plaintiff made a motion to remand the case to the state court. The two motions were argued and heard together, and the court denied the motion to remand the case to the state court (Record, pp. 75–76) and granted the motion to set aside the service of the summons (Record, pp. 77–78).

The judgment setting aside the service of the summons has now been brought to this Court under the fifth section of the Judiciary Act of 1891 (26 U. S. Stat., 826) instead of to the Circuit

Court of Appeals for the Second Circuit, upon the theory that there is a question of jurisdiction involved of such a character as to permit the bringing of the case direct to this Court from the United States Circuit Court for the Northern District of New York.

There is no certificate in the record as required by the statute and the practise of this court, nor is there anything in the record either in the final judgment or in the bill of exceptions or elsewhere which in any way indicates that the case was dismissed by the court below because it was without jurisdiction as a court of the United States, rather than because without jurisdiction in respect of its general authority as a judicial tribunal.

The important facts not to be lost sight of in this discussion are as follows:

I.

It is conceded that there was a difference of citizenship between the parties, which entitled the defendant to remove the case to the federal court.

II.

The amount involved was sufficient to authorize removal. This fact was unknown to defendant

and did not appear from the record until two or three days before the filing of the petition and removal bond (Record, p. 102).

III.

No complaint was ever served by the plaintiff. The time of the defendant therefore to file any paper or take any step in opposition to the complaint had not even begun to run at the time of the removal of the case and consequently its time to remove the case was under the Federal Statutes still open.

IV.

The only objections raised to the removal are formal and technical (Record pp. 96–97) and do not rest "on the contention that there was a lack of jurisdiction in the federal court as contra-distinguished from the state court" *Courtney* vs. *Pradt*, 196 U. S., 89 (Decided Jan. 3, 1905).

V.

The defendant had no property and did no business in the State of New York at the time the summons was served and had had no property and had done no business in such State for years before (Record pp. 94 and 103).

VI.

The director of the defendant who was served with the summons, lived in Chicago, and was at the time of the service temporarily in New York City for a few days on business in no way connected with the defendant. He was in New York City in his individual capacity and not as a director of defendant (Record p. 94).

FIRST POINT.

THIS COURT IS WITHOUT JURISDICTION OF THE CASE, WHICH SHOULD HAVE BEEN CARRIED TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

A direct appeal to this Court from a circuit court under the 5th section of the Court of Appeals Act (26 U. S. Stat., 826) is never allowed under the present practice unless the question of jurisdiction, which was the reason for the dismissal of the case, was a question of the jurisdiction of the lower court as a court of the United States and not a question of its jurisdiction under its general authority as a judicial tribunal. That is to say the word "jurisdiction" in the section of the act referred to is used in the limited and

qualified sense of the jurisdiction of the lower court as a federal court as distinguished from its jurisdiction generally as a judicial tribunal.

The case of Louisville Trust Co. vs. Knott, 191 U. S., 225, was taken by direct appeal to this Court under the 5th section of the Judiciary Act of 1891, as involving a question of jurisdiction. The case was dismissed by this Court for want of jurisdiction, upon the ground that the appeal should have been taken to the Circuit Court of Appeals, inasmuch as the jurisdictional question in the case did not involve the jurisdiction of the lower court as a federal tribunal to hear the case. At page 233, the Court, after discussing the facts in the case, said:

> "In all this there was nothing involving the jurisdiction of the circuit court as a federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

The Louisville Trust Company case is of further importance from the fact that it overruled the decision in the case of *Shield* vs. *Coleman*, 157 U. S., 168. The Shields case is relied on by the plaintiff in error as showing his right to come direct to this Court in the case at bar. This Court, however, in the Louisville Trust Company case held that the appeal in the Shields case direct to this Court should not have been permitted for the reason that the jurisdictional question in that case in the lower court was not as to the jurisdiction of the court as a federal court. At page 236, Judge HARLAN, in speaking of Shields vs. Coleman, said:

> "It is proper to observe that this court in Shields v. Coleman, 157 U. S., 168, 177, assumed jurisdiction upon direct appeal from a circuit court in a case involving the question whether that court had authority to appoint a receiver of property which was at the time in the possession of a receiver appointed by a state court. As the federal court had, in that case, taken property out of the physical possession of a receiver of the state court, this court expressed its views upon the question whether the possession of the state court should have been disturbed

by the federal court, and it rendered judgment accordingly. *But the precise question here presented as to the jurisdiction of this court under the act of 1891, on direct appeal from the circuit court, was not there raised or considered.* In *United States* vs. *More*, 3 Cr., 159, 172 (1805), it was held that this court was without jurisdiction, under the law as it then was, to review the final judgment of the circuit court of the District of Columbia in a criminal case. It was suggested at the bar, in that case, that this court had, in a previous case, exercised appellate jurisdiction in a criminal case. Chief Justice MARSHALL met that suggestion by saying: 'No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case.' To the same effect, substantially, are *United States* vs. *Sanges*, 144 U. S., 310, 319, and *Cross* vs. *Burke*, 146 U. S., 82.

"*In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the fifth section of the Judiciary Act of 1891.*"

In *Bache* vs. *Hunt*, 193 U. S., 523, the question was again raised, and it was held that,—

> "The question of jurisdiction which the act of March 3, 1891, provides may be certified direct to this Court must be one involving the jurisdiction of the circuit court as a federal court and not in respect of its general authority as a judicial tribunal" (Syllabus).

In the very late case of *Courtney* vs. *Pradt*, 196 U. S., 89, decided by this Court on January 3, 1905, the action was commenced in the state court and removed into the federal court upon the ground of diversity of citizenship. After the case had been removed into the federal court, the defendant appeared specially and moved to dismiss the case for want of jurisdiction upon the ground that the court had no jurisdiction of the person. At the time the motion to dismiss the case was heard, a motion was also made to remand the case to the state court. The circuit court overruled the motion to remand and sustained the motion to dismiss, and a judgment was entered "dismissing the suit for want of jurisdiction." No certificate of the question of jurisdiction was granted. An appeal was taken

direct to this Court, and the appeal dismissed for want of jurisdiction upon the ground that the question of jurisdiction in the lower court was one of the general authority of that court as a judicial tribunal, and not one of its jurisdiction as a court of the United States. In the course of the opinion, Mr. Chief Justice FULLER, said at page 91:

> "It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal. * * *
>
> "And the general rule is that the certificate is an absolute pre-requisite to the exercise of jurisdiction here (*Maynard* vs. *Hecht*, 151 U.S., 324). Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as equivalent to the formal certificate. * * *
>
> "No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. *No single and definite issue as to the jurisdiction of the circuit court as a federal court is presented.*
>
> "The case was dismissed for want of jurisdiction over it, as a suit against a

foreign executor, in the courts of Kentucky. The court had power to so adjudicate. When a case has been removed into the circuit court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject-matter in the state courts; or the sufficiency of the service of *mesne* process to authorize the recovery of personal judgment. * * * *It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the federal courts as contra-distinguished from the state courts.* It did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, and we cannot be called upon to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5."

It is very difficult to see what distinction can be drawn between the present case and the Courtney case just cited. Both were removal cases; in both a motion was made to dismiss the case for want of jurisdiction of the person of

the defendant; in both a motion to remand was made and argued with the motion to dismiss; in both the motion to remand was denied, and the motion to dismiss granted; in both no certificate of the question of jurisdiction was granted by the court below; in each judgment was entered dismissing the case for want of jurisdiction over the defendant by the service of process in the case. The similarity between the two cases is certainly extraordinary, and we know of no ground of distinction between them.

If, therefore, in the Courtney case the dismissal of the suit on the ground that the service of process was not of such a character as to give the lower court jurisdiction, did not create a right of direct appeal to this Court for the reason that such a question of jurisdiction was not within the meaning of the word "jurisdiction" as used in the 5th section of the Court of Appeals Act, it would seem to follow that the present case could not come direct to this court for the same reason. Further than that if no direct appeal would lie in the Courtney case upon the ground that the motion to remand was not "rested on the contention that there was a lack of jurisdiction in the federal courts as contra-

distinguished from the state court," the same result must follow in the case at bar as the grounds for the motion to remand the present case were merely technical and there was never any claim that there was no "power of the circuit court as a court of the United States to hear and determine the case." It would seem therefore as if the present case was controlled by the decision in the Courtney case and must be dismissed for want of jurisdiction.

It is clear that the court below as a court of the United States had jurisdiction of the case at bar. It was between citizens of different states. The amount involved was over two thousand dollars. It was a case of which the federal court would have had original jurisdiction. It was a case, therefore, that the defendant, being a non-resident, was entitled to remove and try in the federal court. The motion to remand did not deny this. It did not put in issue the power of the lower court, as a court of the United States, to hear and determine the case. It simply sought to prevent the trial of the case in the federal court on various technical grounds which will be found stated in the brief of plaintiff in error as follows:

1. That the defendant in error had waived and was estopped from asserting any right which it had to remove the case to the federal court (brief of plaintiff in error, p. 40).

2. That there was laches in filing the petition on removal (brief of plaintiff in error, p. 53).

3. That the state court was not in session at the time of presentation of petition and bond (brief of the plaintiff in error, p. 87).

4. That the petition for removal was insufficient (brief of plaintiff in error, p. 87).

It is to be noticed that nowhere is the point made in the lower court that the motion to remand should be granted upon the ground that there was a lack of jurisdiction in the federal court as distinguished from a state court. The whole motion was based on technicalities, which at the most, would have given the plaintiff in error the right to take the case to the Circuit Court of Appeals, and to have it there determined whether his technical objections were sound. He only had the right to come to this Court direct upon the ground that the motion which he had made to remand put in issue the power of the

lower court as a court of the United States to hear and determine the case. None of the questions—of the time of filing petition and all the other technical questions raised by the plaintiff in error on the motion to remand—go to the jurisdiction of the court as a court of the United States. They are simply formal and technical questions and not jurisdictional ones. This is well brought out by Mr. Justice GRAY, in *Powers* vs. *Chesapeake & Ohio R. R. Co.*, 169 U. S., 92, 98, where he said:

> "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. * * * But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice BRADLEY, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel."

In the present case there is no certificate as required by the Circuit Court of Appeals Act. It is necessary, therefore, to see if in the application for the writ of error, or in the judgment, or anywhere else in the record, there is definitely

presented any issue as to the jurisdiction of the court below *as a federal court.* The judgment of dismissal (Record pp. 78–79), does not so show. With the exception of the recitals, the judgment reads as follows:

> "It is hereby ordered and adjudged that this cause be and the same is hereby dismissed for want of jurisdiction of the defendant."

The writ of error was allowed, as stated in the order of allowance,

> "solely upon the question of the jurisdiction of the court as prayed for in said petition to review the question of the jurisdiction of the court in said petition mentioned, which is the only question arising herein" (Record, p. 114).

These citations from the record are relied on by plaintiff in error as rendering unnecessary the certificate as to jurisdiction required by the Act of Congress and the practice of this court. Neither quotation shows that the jurisdictional ground upon which the case was dismissed was that the court as a federal court had no jurisdiction of the case. It therefore appears that nowhere in the record was such question plainly

stated or even hinted at. This of course could hardly be otherwise, inasmuch as the case was dismissed by the court below in an exercise of its general authority as a judicial tribunal, and not for the reason that the court as a federal court did not have power to try the case.

We, therefore, find in this case no certificate as required, and nothing in the record which takes the place of such certificate. That is to say, if there had been a certificate, it would have been necessary for it to show that the case was dismissed by the court below for want of jurisdiction of such court as a federal tribunal, and in the absence of such certificate, it is certainly necessary to find some statement in the record (beyond the mere statement that the court dismissed the case for want of jurisdiction) which would show that the ground of dismissal was because the court had no jurisdiction of the action as a federal tribunal, and not merely for the reason that it had no jurisdiction as a judicial tribunal.

As we understand the practice, it is necessary that the certificate, or the record in the absence of the certificate "affirmatively show that the trial court sends up for consideration a single

definite question of jurisdiction" (*Shields* vs. *Coleman*, 157 U. S., 168, 177), and that under the later decisions of this Court such question of jurisdiction must be of the jurisdiction of the court as a court of the United States, and not of its general authority as a court. In the absence of such certificate, or of any such statement in the record, it would seem under the authorities that this case must be dismissed for want of jurisdiction.

In the brief of plaintiff in error, he refers at page 40 to the case of *Shepard* vs. *Adams*, 168 U. S., 618, as an authority for the proposition that the question of whether or not a court acquired jurisdiction by a proper service of process can be reviewed by this Court upon writ of error direct to the circuit court. He also refers on the same page to *Powers* vs. *Chesapeake & Ohio R. R. Co.*, 169 U. S., 92, to show that the question whether a lower court has jurisdiction, upon the ground that the case has not been duly removed from a state court, can be reviewed by this Court upon writ of error direct to the circuit court.

An examination of the Shepard case will disclose that there was no discussion by this

Court of the proposition that the only jurisdictional question, which could be taken direct from the circuit court to the supreme court under the Circuit Court of Appeals Act, must be whether the court had jurisdiction as a court of the United States or as a federal tribunal. It will also appear from an examination of the Powers case that this question of jurisdiction as it is now understood by this Court was not there considered.

The Shepard case and the Powers case, if inconsistent with the doctrine of *Courtney* vs. *Pradt* (decided January 3, 1905), must be deemed to be overruled by the latter case for the two questions involved in the Shepard and Powers cases were directly raised in the Courtney case and it was held that this Court had no jurisdiction in such cases of a direct appeal under the 5th section of the Act of 1891. Further than that, all cases decided prior to the case of the *Louisville Trust Company* vs. *Knott*, 191 U. S., 225, which are inconsistent with the doctrine there laid down, must be deemed to have been reversed, when this Court declined to follow its decision in the Shields case upon the ground that the question of jurisdiction as now understood by this Court was not raised

therein, viz.: that the jurisdiction meant in the Circuit Court of Appeals Act, which gave a direct appeal to this Court, was the jurisdiction of the lower court over the case as a federal tribunal, and not as a judicial tribunal. In other words, when this Court, in the Louisville Trust Company case, reversed the decision in the Shields case, and held that the appeal in the latter case should have been to the Circuit Court of Appeals and not direct to this Court, it reversed all the other cases which had been previously permitted to be brought direct to this Court, in which the jurisdictional question in the lower court was not as to the jurisdiction of such court as a federal court.

In other words, as we understand the case of *Louisville Trust Co.* vs. *Knott*, it was the intention of this Court to there lay down the new rule as to the true meaning of the word "jurisdiction," as used in the 5th section of the Circuit Court of Appeals Act, in such a way that thereafter there could be no mistake as to the kind of a case which could come direct to this Court from the circuit and district courts. As was said by Mr. Justice HARLAN at page 236:

> "In the circumstances of the present case and to avoid misapprehension in the

future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the fifth section of the Judiciary Act of 1891".

Under the definition as given in the Louisville Trust Company case, it is clear that this Court has no jurisdiction of the present case, and any authorities which may indicate that previously such cases were allowed to be brought direct to this Court must be taken to be overruled by the later cases and the present practice which is, that no case can come direct to this Court on the question of jurisdiction except where the jurisdiction is alleged to have been improperly exercised or denied upon the ground that the court below had or did not have jurisdiction as a federal court, as distinguished from its general jurisdiction as a judicial tribunal.

The rule is now distinctly declared by this Court in its later decisions as to what questions of jurisdiction can be brought direct from the circuit and district courts, and not to dismiss this case under such later decisions would be to throw the whole subject into confusion.

We therefore respectfully submit that this Court has no jurisdiction of the case at bar under

the ruling in *Courtney* vs. *Pradt*, upon the following grounds:

(1) That the case was not dismissed in the court below upon the question of want of jurisdiction of the court as a court of the United States, but of its want of jurisdiction of the defendant under its general authority as a judicial tribunal.

(2) That the motion to remand was made upon technical grounds, and that there was nothing to indicate that it rested (as in fact it did not) on the contention that there was a lack of jurisdiction in the federal court as contra-distinguished from the state court.

SECOND POINT.

THE MOTION TO REMAND WAS PROPERLY DENIED.

In case the Court should not agree with the first proposition in this brief that it is without jurisdiction of the case for the reason that the dismissal of the action for want of the service of the summons upon the defendant was not a question of the jurisdiction of the court below as a court of the United States, but in respect of its general authority as a judicial tribunal, and for the further reason that the motion to remand was not rested on the contention that there was a lack of jurisdiction in the federal court as distinguished from the state court, and did not in terms put in issue the power of the circuit court as a court of the United States to hear and determine the case, it is then necessary to take up the merits of the case.

It is to be noticed that the plaintiff in error in his brief places his chief claim to a reversal of the judgment below upon the fact that the motion to remand was denied, and he says very little with reference to the decision of the Court below upon the motion to set aside the service of

the summons. We shall therefore discuss first the questions arising under the motion to remand.

I.

In substance the sole ground of the motion to remand was that the defendant below had lost the right of removal by reason of a default in appearing, which was subsequently relieved by the court. The defendant had appeared specially in the case for the purpose of making a special motion, which it could not do, if a general appearance had been filed. In order to protect its rights, it had obtained an extension of time in which to file a general appearance if the special motion, which it had made, should be denied and it decided not to appeal (Record, p. 72). Such special motion was denied and the defendant determined to appeal. After the decision of the special motion, and before the appeal, the time of the defendant to appear generally had expired, its attorney assuming that he had *twenty* instead of *ten* days after the determination of the motion in which to appear generally. This inadvertence, which was undoubtedly caused by the illness of defendant's attorney (Record, p. 102), was remedied by the court when called to its attention and the default opened.

As said before, the entire motion to remand comes to this one question, whether a defendant inadvertently in default for a few days as to the filing of a general appearance, is, when relieved from that default, deprived of his right to remove to the federal court, if such right is his in every other respect. It is to be noticed that the default here was not a default in answering, and that the time to remove had not thereby expired. The defendant had the right to remove up to the time when required to file its answer, or some pleading in opposition to the complaint. No complaint had been then or has ever been filed in the case. The opening therefore of the default in appearing generally placed the defendant in the position in which he was before, so far as his right of removal was concerned.

The only case in which the precise point has been passed upon by the courts is *Dantel* vs. *Goodyear Shoe Machinery Company*, 106 Fed. Rep., 551. While the case was pending in the state court, the defendant made default in appearing. Subsequently the defendant was relieved from such default, and afterwards removed the case to the federal court. A motion was

made by the plaintiff to remand the case upon the ground that the defendant by its default had lost the right of removal. The motion was denied and the opinion of Judge LACOMBE was as follows:

> "Motion to remand is denied. Service of summons without complaint did not set running the time within which, by the laws of the State, defendant is required 'to answer or plead to the declaration or complaint of of the plaintiff.' Wisely so, because until complaint is served defendant may not be able to determine what cause of action plaintiff asserts—information which may be important to the decision whether he will or will not remove. Extension of time to answer (after default, when summons had been served) extended time to remove in this circuit, *and right of removal was never lost.*"

In *Cady* vs. *Associated Colonies*, 119 Fed. Rep., 420, an action was commenced in the state court of California on the 27th day of February, 1902. The defendant defaulted in entering its appearance and a judgment by default was entered in the state court on April 2, 1902. On September 20, 1902, the defendant appeared by counsel in the state court and filed a motion

with the clerk to vacate and set aside the default and judgment and to quash the summons. Upon the same day, the defendant removed the case to the federal court. In the federal court, the motion to set aside the summons was granted upon the ground that the corporation did no business in the State of California. In the course of its opinion, the court said, at page 423, as follows:

> "The suggestion of the plaintiff that the case be remanded to the state court to have this motion determined cannot be entertained. This court cannot abdicate its authority or duty in any case in favor of another jurisdiction. Moreover, the appearance of the defendant in the state court, under the circumstances, was not a waiver of objection to the jurisdiction. * * * But the authority of this court to determine whether the state court had jurisdiction of the defendant to make the order and enter the judgment contained in the record has a wider scope than the power conferred upon the state court to set aside defaults, as provided in section 473 of the State Code of Civil Procedure."

It is to be noted that the foregoing case was

removed to the federal court at a time when the defendant was in default and had been in default for many months, and a judgment of default had been actually entered against it and had not been set aside at the time of removal. In other words, in the case at bar, the question of whether the defendant was for a day or two inadvertently in default in appearing (not answering) had nothing to do with its right to remove the case to the federal court and a relief from such default in no proper sense extended its time to answer any more than it extended its time to serve a notice of trial or to take an appeal to the Court of Appeals.

II.

THE PETITION AND BOND ON REMOVAL WERE FILED IN TIME UNDER ANY ASPECT OF THE CASE.

This Court held in *Powers* vs. *Railroad Co.*, 169 U. S., 92, that no party to a controversy in the state court could remove it to the federal court so long as there "*does not appear of record to be any removable controversy*" (p. 100), and further held that a defendant could remove to the federal court a controversy not originally appearing of record to be a removable action, when-

ever it became on the record a removable cause, even though the time of the defendant to answer had then expired. The ground of the decision being that "*the time of filing a petition for removal is not essential to the jurisdiction;* the provision on that subject being in the words of Mr. Justice BRADLEY, 'but modal and formal'" (p. 98):

The Court, in discussing the question, said at page 100:

> "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. *But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it,* and the provision of the act of Congress, that 'any party entitled to remove any suit,' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases. * * *

> "The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, *is to hold that* the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

In *Speckart* vs. *Bank*, 85 Fed. Rep., 12, it was held that

> "The provision * * * that a petition for removal of a cause may be filed at or before the time required for answering or pleading, is modal and formal, and does not operate to prevent a removal, where the cause does not become a removable one until after that time has expired" (Syllabus).

In the case of *Fogarty* vs. *Southern Pacific Co.*, 121 Fed. Rep., 941, the action was not at the time it was brought removable, but subsequently became so. It was held by the court that the

application for removal having been granted nineteen days from the time when the right of removal arose, was in time. The syllabus of the case is as follows:

> "The motion for removal having been granted nineteen days from the dismissal will be held to have been made within a reasonable time after the right of removal arose, though it did not appear when the moving party learned of his right to remove, or when the petition for removal was filed."

In *Guarantee Co.* vs. *Hanway*, 104 Fed. Rep., 369, it was held:

> "Where a case is not removable when the time for its removal prescribed in the acts of Congress expires, but subsequently becomes removable by amendment or otherwise, the filing of a petition and bond for removal within a reasonable time thereafter entitles the petitioner to a transfer of the case to the federal court."

It will be noticed that Mr. Justice GRAY in his opinion in the Powers case makes the point that no party can remove a cause "so long as there does not appear of *record* to be any removable controversy." This was the situation in the present case. There did not appear of record

to be a removable controversy in this action, until the affidavit of Hiram Remington, verified October 16, 1903, was served upon the attorney for the plaintiff on October 23, 1903. The defendant then most promptly and as soon as it was able to prepare a petition on removal applied to the state court to remove the case (Record, p. 102). Under the ruling, therefore, in the Powers case, the defendant lost no right of removal by anything which transpired in the action prior to its appearing on the record to be a removable controversy. We therefore can banish from the discussion of this question all the argument of the plaintiff and all his authorities based upon anything which took place before October 23, 1903, when for the first time, the action became, on the record, a removable controversy.

In view of the Powers case, the whole question comes to this;

Can a defendant lose the right to remove a cause clearly within the jurisdiction of the federal court on account of a circumstance which occurred before the action became a removable controversy?

On Saturday, October 24, 1903, the default of defendant in error was relieved and the order entered in state court on October 26.

On Friday, October 23, 1903, the present action first became on the record therein a removable controversy. On Monday, October 26, 1903, the case was removed to the federal court. Is it possible to seriously argue that the right of removal had been lost by a default in appearing which inadvertently took place before the right of removal existed. How can a right be lost at a time when it did not exist?

There is no authority so far as known and the other side has certainly referred to none which holds that a defendant has not removed his case in time, because he has made an inadvertent default in appearing at a time when the cause was not removable to the federal court. No other line of authorities is in point in the case at bar.

The case became a removable controversy on October 23, 1903. The time of the defendant to answer had not even begun to run when on the 26th of October, 1903, the petition and bond were filed. It would seem to be a simple case of an action between citizens of different States involving more than two thousand dollars in which the application for removal was made before the time of the defendant to file any pleading in opposition to the complaint had expired.

The plaintiff in error has tried on page 82 of his brief to confuse the real question by suggesting that the defendant was in default on October 26, 1903, because of the fact that the order of the state court entered on October 26, 1903, was initialed by the Judge on October 24, 1903. There is no room for discussion in this regard as it is settled by the state courts that an order takes effect from the day of filing in the Clerk's office.

In *Wilcox and ano.* vs. *National Shoe & Leather Bank*, 67 App. Div., 466 [1902], the bank, the day after an order was made appointing Receivers of the corporation, but before the order had been entered in the County Clerk's office, applied the balance standing on its books to the credit of the corporation upon a note made by the corporation and held by the bank, which fell due on that day. It was held that the order took effect from date of *entry* in the County Clerk's office. The court reviewed the authorities, and said as follows, at page 468:

> "It seems to have been assumed, without dispute, in all the cases which have come under our observation, that *the entry* of a court order under direction was a necessary

step in the perfection of that order. * * * And so through many other cases it has always been assumed that the ultimate act perfecting an order of the court, *so as to make it operative, is its entry*, which, as above remarked, may be the time it is filed with the clerk."

In *Hastings* vs. *Twenty-third Ward Land Co.*, 46 App. Div., 609, the point was raised as to the time at which an order confirming assessments became effective, and the court said at page 611:

"It is quite clear that the order of the court became operative and the report became confirmed on the day *that the order was entered* by the clerk of the court. The initialing of the formally prepared order by the Judge was simply a direction to the clerk to enter the order. Such initialing was unnecessary to make the order valid. A direction of the Judge, either verbally or in writing to the clerk to enter the order, and his entering the order under such direction, was the evidence of the decision of the court, and upon the day *of the entry* of the order the report stood confirmed. The time when the Judge affixed his initials to the order was of no importance. It was his delivery to the clerk of the order, with a

direction to enter the order, *and its entry* by the clerk, which gave it validity."

In *Vilas* vs. *Page*, 106 N. Y., 455, it was said:

"We are of opinion that the order became *effective* as an authority to the Receiver upon its being *filed with the Clerk*."

The great consideration here is that this action was one which the defendant in error under the Constitution and laws of the United States was entitled to try in the federal court. The plaintiff in error has attempted to deprive it of this statutory right upon the very technical ground that in some way it had lost the right of removal by an inadvertent default in appearing, happening before the cause was of record a removable one and cured by the court. Our answer has always been that the defendant in error strictly complied, in making its application for removal, with every requirement of the Federal Act as to the time of application and otherwise, and that in any event in the words of Mr. Justice GRAY, "the time within which a removal must be applied for is not jurisdictional but modal and formal" (169 U. S., 92, 99).

We therefore respectfully submit that the removal was in time under every aspect of this

case, and that the right to remove could not possibly be lost by a circumstance happening at a time when the case on the record was not a removable controversy. A man cannot lose that *which he has not.* A *defendant* cannot *lose* a right of removal at a time when he has no such right.

III.

If the Court should not agree that this whole discussion is ended and settled, by the decision of Judge LACOMBE in the Dancel case cited in subdivision I. of this point, and by the Powers case (169 U. S., 92), in favor of the defendant in error's claim that the removal was in time, we then take up the question independently of those cases.

The petition for the removal of this case from the state court to the federal court states the diversity of citizenship of the parties and that the amount involved is more than two thousand dollars, exclusive of interest and costs, which under the United States Statutes is the jurisdictional amount required to be involved in a case before it can be removed to the federal court for trial. It is important to notice that the plaintiff in error has never in any way contested these two important

and vital jurisdictional facts. It is substantially conceded by him that the case is one which under the statutes of the United States the defendant in error is entitled to try in the federal court and one over which such court would have had jurisdiction if originally commenced therein. He, however, seeks to prevent the trial of the case in the federal court upon the technical ground that the defendant did not exercise its right of removal in time.

The Removal Act of 1888 (25 U. S. Statutes, 433–435) provides as follows:

> "SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court, to the circuit court of the United States, he may make and file a petition in such suit in such state court *at the time, or any time before the defendant is required by the laws of the State, or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff*, for the removal of such suit into the circuit court to be held in the district where such suit is pend-

ing, and shall make and file therewith a bond with good and sufficient surety, for his o· their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

The question which presented itself to the court below upon the motion to remand was whether the time of the defendant to answer or plead to the declaration or complaint of the plaintiff had expired prior to the removal of the case. No complaint had ever been served in the case. It is therefore difficult to see how the time of the defendant to answer or plead to a complaint, which had never been served, could have expired.

On October 2, 1903, an order was entered denying the motion of the defendant to set aside the service of the summons. The appeal from this order was taken October 15, 1903, three days after the time of the defendant to appear generally in the case had expired. This slip of three days was the result of the illness of the attorney for the defendant who had the case in charge (Record, p. 102), and who inadvertently supposed that the time of the extension to appear generally was twenty days instead of ten. This period of three days is the only time when there was any default in appearing on the part of the defendant, and this default in appearing was the one relieved by the court. It was not known that the defendant was in default in appearing at the time the appeal was taken, and it was such a trivial matter that the court instantly relieved the defendant therefrom the moment it was called to its attention.

We urge upon the Court the point that this default, from which the defendant was relieved, was not a default in serving its answer and that the time of the defendant to answer had not expired in any proper sense of the term, and certainly not within the meaning of any authorities

holding that, when a party's right to answer expires on a certain day and the party is in default in serving his answer, such party cannot by obtaining relief from such default enlarge the time to remove given by the Act of Congress and specially required to take place before a certain fixed time. In the present case the time of the defendant to answer had never begun to run, as no complaint had been served. As it had not begun to run, it could not very well expire or be extended. The time of the defendant to serve its answer was no more extended by the order relieving its default in appearing than was its time to serve its case on appeal to the Court of Appeals or to take any other step in the litigation.

The question therefore which now arises is whether such inadvertent default of three days prevented the defendant from removing the case to the federal court when it had been relieved from such default by an order of the state court. In other words, had the time of the defendant in this case to answer or plead to the declaration or complaint of the plaintiff expired? It is certainly not plain how this can be so in view of the fact that the default in appearing (not answering) had been opened, and that when the case was

removed, the defendant was presenting to the Appellate Division by special appearance the question whether the court had jurisdiction by reason of the service of the summons.

As we understand it, the question in the case comes to this:

> Does a defendant by making default in appearing (*not in answering*), which default is relieved by *order* of the court, thereby lose the right of removing the case to the federal court, if the action is otherwise removable and the bond and petition are filed before the time fixed by the State law for serving its answer?

We know of no case which so holds, and the plaintiff in the authorities cited by him refers to no such case. Any authorities to be found as to extending the time to answer after default in answering are not in point. This question would seem to be controlled by the wording of the Act of Congress itself, which provides that the defendant can remove any case of which the federal court would have original jurisdiction, if he makes the application in any stage of the action prior to the time or at the time when he is required to file some pleading in opposition to

the complaint. Now in this particular litigation the answer or any pleading or action in opposition to the complaint has never been due. The time to answer has never even begun to run—has never been put in operation, as the complaint has never been served and the time of the defendant to answer or otherwise plead is twenty days after a service of a copy of the complaint. By the order of the court, entered October 26, 1903, the defendant was relieved from its default in appearing, not of its default in serving its answer, and its time to serve its answer was not extended by the court, except in the most remote sense that the litigation was permitted to continue and the plaintiff was not allowed to take advantage of a slip on the part of the defendant's attorney. Its time to answer was no more affected by the order relieving the defendant from default in appearing than was its time to serve a notice of appeal from a final judgment in the case to the Court of Appeals or a notice of argument in that court.

In other words, when the state court relieved the defendant from a default in appearing generally, the situation was that the defendant had appeared specially in the action and had appealed

to the Appellate Division upon the question whether the service of the summons was a proper one. At the time the appeal was taken the defendant was inadvertently in default in appearing generally. From this default the court relieved the defendant.

The state court certainly had the power to relieve the defendant from its default and to place the litigation in the same situation as if the default had never occurred, and by doing so it did not relieve any default of the defendant in answering, for the reason that the latter had never been in default as to its answer and never under obligation to serve any answer, as no complaint had ever been served, and it had therefore never suffered any default in that regard.

We therefore respectfully submit that it is impossible to twist an order relieving the defendant from default in appearing generally, into an order extending the time of the defendant to answer, after the defendant had allowed the time in which it was permitted to serve its answer to go by.

If the following facts are constantly borne in mind in the consideration of this case, we submit that they mark a clear and certain path through

all the maze of fact and authority contained in the brief of the plaintiff in error:

(1) The case is one clearly within the jurisdiction of the federal court, as the requisite diversity of citizenship exists and the case involves more than $2,000.

(2) "The time within which a removal must be applied for is not jurisdictional but modal and formal" (169 U. S., 92, 99).

(3) The case was not a removable case, so far as the defendant was advised, and was not on the record a removable case until after the appeal from the order denying the motion to set aside the summons and until the affidavit of Hiram Remington, verified October 16, 1903, was served upon its attorneys on October 23, 1903 (*Powers* vs. *Railroad Co.*, 169 U. S., 92).

(*a*) The application to remove was made immediately thereafter.

(*b*) There was no attempt to experiment with the state court. The motion to set aside the summons was originally made in the state court because there was no alternative (the case not then appearing by the record or known to defendant's attorney to be a removable controversy). As soon as it was possible for attorney of defend-

ant to make the necessary allegations in the petition of removal, the case was removed without waiting to see what the state court might decide.

(4) No complaint was ever served. Therefore the time of the defendant to answer never began to run. As it had never commenced, the time to answer had, of course, not expired when the case was removed.

(5) The default of the defendant from which it was relieved was a default in appearing and not in answering.

(6) Such relief from default in appearing did not revive a lost right to answer, as the defendant never had a right to answer which it could lose, for the reason that no complaint was ever served.

(7) The time of the defendant to serve its answer was no more extended by an order relieving it from default in appearing than was its time to serve a notice of trial or of argument or of appeal or to take any other step in the case.

(8) The special appearance in the state court and the motion to set aside the summons was, of course, not in any sense a plea or answer to the complaint, as no complaint had been served.

Reply to Brief of Plaintiff in Error in Regard to Motion to Remand.

I.

In the second point of the brief of plaintiff in error at page 40, there is an attempt to claim that the defendant by some act on its part had lost the right of removal and was estopped from bringing the case to the federal court. It is not clear just what the plaintiff in error claims to have been improper on the part of the defendant. At the time of removal an appeal had been taken in the state court from the order denying the motion to set aside the service of the summons, and a motion had been made for a stay of proceedings.

This motion was made on October 16, 1903, and was returnable October 24, 1903. Between the date of the notice of motion and of the return, the case became a removable case upon the record. There was certainly no obligation on the part of the defendant to abandon its motion for a stay of proceedings pending the appeal, and its time to remove the case was in no way affected by what it did with reference to such motion. Suppose the appeal had been argued, and the Appellate

Division had sustained the court below and affirmed the order denying the motion to set aside the service of the summons, and the plaintiff had served his complaint, there would have been nothing to prevent the defendant from then removing the case to the federal court for trial. There can be no question as to this inasmuch as the defendant under the New York practice, has twenty days in which to file its pleading, or take some step in opposition to the complaint. Under the federal statute the defendant has until the expiration of such time in which to remove his case. Therefore nothing could have been done on the motion for a stay of proceedings which would affect the right given defendant by the United States statutes to try his case in the federal court. Nothing done in an action in a state court long before the time for removal has expired can affect or take away such right. The only requirement of the federal statute is that the application for removal shall be made before the time to file the answer has expired. If this is done it is no concern what steps the plaintiff may have taken in the state court before such time.

The many authorities referred to on page 41

of the brief of the plaintiff in error seem to have no application in the case at bar.

Case vs. *Olney*, 106 Fed. Rep., 433, does not seem to touch the question in controversy here. There a demurrer had been filed to the complaint. The words in the Removal Act "to answer or plead to the declaration or complaint" have been construed as including the filing of a demurrer. The demurrer in the Olney case was filed April 3, 1900. The petition for removal was not filed until June 19, 1900. It was very apparent there that the time to answer the complaint had long since expired, as the longest period allowed by the state court was thirty days from the date of the service of the summons, and assuming the demurrer which was filed April 3, 1900, to have taken the place of the service of the summons, because of the voluntary appearance of the defendant for the purpose of filing the demurrer, it was clear that the time to file the petition for removal expired thirty days after April 3, 1900, and long before the filing of the petition on June 19, 1900.

The case of *Chicago I. & N. P. R. Co.* vs. *Minnesota & N. W. R. Co.*, 29 Fed. Rep., 337, arose under the old Act of Congress of 1875, and

the only question there was whether the defendant could carry on the action both in the federal court and also in the state court upon an appeal from an adverse decision on an application for a writ of injunction. It was held that he could not, and that as he had elected to continue in the state court after removal to federal court, the whole case must go there.

The case of *Hanover National Bank* vs. *Smith*, 13 Blatchf., 224, would seem to have nothing to do with the question here at all. The case arose under the old Act of Congress of 1875 which required the defendant to remove the suit before or at the term at which said cause could be first tried and before the trial thereof. The defendant applied for a postponement of the case when it was moved for trial and could have been tried. The court refused to postpone it, unless the case was referred. The defendant agreed to refer the case and then, after obtaining a postponement of the case, made an application to remove it to the federal court. It was held on a motion to remand that the time of removal had expired, inasmuch as the case had been called for trial and would have been tried, except for the adjournment obtained upon the statement of the defendant's counsel.

It is not clear how plaintiff's counsel can consider that the Hanover Bank case has any application in the present controversy, inasmuch as the motion to stay the proceedings in the case at bar pending the appeal was noticed long before the case was known to be a removable one, and because the application for a stay of proceedings has nothing whatever to do with an extension of time of defendant to answer to the complaint. Certainly a relief from a default in appearing can not be turned into an extension of time to answer, after a default in answering, as the time of the defendant to answer in this case had not even begun to run (no complaint having been filed), and, therefore, could not by any possibility have expired.

Certainly the defendant has done nothing in the state court by which he has secured any benefit which would prevent him from asking for a removal of the case. It may be that under certain circumstances, where a defendant's time to remove a case has expired, and he then obtains an extension of that time by some act on his part, he will be estopped by such act from removing the case, for the reason that the court would not have granted his request, if it had

understood the purpose thereof. This however is not the situation in the case at bar, as the time of the defendant to remove the case under the federal statute had not expired and not then begun to run, and would not begin to run until a complaint was served, which was not then done and has never since been done in the case.

The case of *Manning* vs. *Amy*, 140 U. S., 137, does not seem to touch the question at all. In that case there was an alternative or conditional application for removal, and of course such an application cannot be deemed to be within the provisions of the Removal Act.

II.

The third point of the brief of plaintiff in error, with reference to laches in filing the petition for removal is not very clear. It is difficult to see how there can be any laches in filing the petition when the time to file it, under the federal statute, was still open and would be until twenty days after the service by the plaintiff of a complaint. Until such time, there certainly could be no laches in filing the petition. A person can hardly be guilty of laches in the

filing of a paper if he files it before his time to do so has expired.

The cases referred to at the bottom of page 65 of the brief of counsel for the other side are cases in which the time of the defendant to answer had expired by default. These cases simply held that under such circumstances, where the right to remove had been lost, it could not be revived. This is not the situation in the present case. The time to answer had not expired in this case, and had not even begun to run at the time it was removed to the federal court, as no complaint had then been served.

III.

It is not exactly apparent what the fifth point of the brief of plaintiff in error has to do with the matter. When the case became removable has very little to do with the right of the defendant to remove it, and with the time of the defendant in which to make the application, so long as the time to remove had not expired. Even if it had been proper to remove the case upon the service of the summons, yet it did not mean that because of the right to make such removal, it must be done before the time for it to answer the complaint had expired.

The cases of *Coffin* vs. *Philadelphia W. & B. R. Co.* 118 Fed. Rep., 688, and *Zinkeisen* vs. *Hufschmidt*, 30 Fed. Cas., 933, cited on pages 70 and 71 of the brief of plaintiff in error, are hardly logical. If the claim of the plaintiff in error was not in excess of $2,000 the federal court would not have original jurisdiction of the cause. If the federal court had no original jurisdiction of the cause, it was not a removable case. Whether the case does involve more than $2,000 depends upon the claim of the plaintiff. If he sees fit to claim less than that, although he might have made a larger claim if he chose, the case is not within the original jurisdiction of the federal court and therefore not a removable case.

These two cases not only have nothing to do with the question in controversy, but would seem to be in conflict with the Powers case which expressly held, that "so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it" (169 U.S., 92, 100).

At page 77 of the brief of plaintiff in error, it is claimed that the petition for removal is insufficient in its allegations. Our only answer to this is that the petition, as will be seen from

reading it, complies in every respect with the requirements of the Removal Act.

IV.

It is objected at page 87 of the brief of plaintiff in error that there was no presentation of the petition and bond to the state court in session. If there was anything in this point, it would mean that few cases in the country districts of the various states could be removed to the federal court, as for long periods of time, the state court is not in session. It cannot be that the constitutional right of a defendant to try his case in the federal court is to be determined to any extent by whether a state court is actually in session. If on a given day, his time to file the petition and bond expires under the federal act, he surely cannot lose the right to bring the case into the federal court, because of the fact that no state court is in session, and he is unable to present the petition and bond in open court.

As we understand it the petition in this case was presented to the state court within the meaning of any requirement of the Removal Act, and by it received. Judge ROGERS endorsed on the petition the following words (Record, p. 3):

"Read on application, Oct. 26, 1903, W. M. R., J. S. C."

At the same time the bond was approved by the court, both as to form and the sufficiency of securities, and the Judge endorsed thereon the following "I hereby approve of the within bond as to form and sufficiency of surety, dated October 26, 1903, WATSON M. ROGERS, J. S. C." (Record, p. 6). The petition and bond were then filed in the Clerk's Office.

The Removal Act provides as follows:

> "That whenever any party * * * may desire to remove such suit from a state court to the circuit court of the United States *he may make and file* a petition in such suit in such *state court*, * * * and shall make and file therewith a bond with good and sufficient surety."

It will be observed that the act does not require the presentation to the court, but simply the filing of such petition and bond. It is not clear how there could be under the practice of the State of New York, any filing, except the filing in the Clerk's Office.

It is, however, unnecessary to argue this proposition for the reason that the presentation to

Judge ROGERS, a Justice of the supreme court of the state, was certainly a fulfillment of the requirements of the Removal Act, and no case is cited by the other side in which an action has been remanded to the state court for the reason that the petition and bond were presented to a Judge in Chambers and not in open court. It is true that counsel for the other side refers to the case of *Williams* vs. *Mass. Ben. Assn.*, 47 Fed., 533, in which a motion was made by the defendant to compel the plaintiff's attorney to receive the *defendant's answer*, and that that motion was denied by Judge Cox upon the ground that the case had never been removed into the federal court, but was still in the state court. That was not a motion to remand and the facts there were peculiar and have no resemblance to the present case, as the state court to which the application was made declined to receive the petition and bond, the Judge stating that the bond was defective and that he had no power to act upon the application. In the present case the court to which application was made acted upon the application and accepted the petition and bond as required by the Act of Congress. We think, therefore, that the Williams case referred to by

the other side is of no importance here, because in the first place, it did not arise upon a motion to remand, and in the second place, the state court to which the application was made declined to grant it, the Judge stating that the bond was defective and that he had not the power to receive the application.

In any event the decision of Judge Cox referred to by the plaintiff must be deemed to be overruled so far as the Northern District of New York is concerned, by a subsequent decision of Judge WALLACE in the case of *Noble* vs. *Mass. Benefit Assn.*, 48 Fed. Rep., 337. This case came before the court on a motion to remand, and Judge WALLACE in the course of his opinion, stated as follows at p. 338:

> "In my judgment, notwithstanding recent opinions to the contrary by judges whose views are entitled to great weight, *it does not require the removing party to present his petition or bond to a judge, either in vacation or in open court, but is satisfied when he files them with the official custodian of the records of the court.* The statute requires him to make and file a petition and bond 'in the suit' in the state court. It does not, in terms, require him to make any other pre-

sentation of them to the court; and if he moves the consideration of the court, or of a judge, upon them, his rights are not enlarged or abridged by the action of the court or judge. The statute requires the state court to 'accept' the petition and bond, and 'proceed no further in the suit.'" * * *

"Certainly it is the decorous practice for the removing party to present his petition and bond to the judge of the state court, and obtain the formal acceptance of the court. It is also the safer practice, because he can thereby have an opportunity to obviate any remediable objections which are suggested to their sufficiency in case the court refuses to accept them. *But this is not indispensable*, and when they are brought to the attention of the court in the manner prescribed by the statute, by filing them in the suit, the court can proceed no further, if they are sufficient."

It is to be noted that we followed the decorous practice suggested by Judge WALLACE of presenting the "petition and bond to the Judge of the state court."

In *Loop* vs. *Winters' Estate*, 115 Fed. Rep., 362, it was held, following the decision of Judge WALLACE:

"It is not essential to the removal of a cause that an order therefor should be made by the state court; the filing of a sufficient petition and bond effects the removal without any action of the Court." (Syllabus.)

THIRD POINT.

THE JUDGMENT OF THE COURT SETTING ASIDE THE SERVICE OF THE SUMMONS WAS RIGHT.

The only affidavits filed upon the motion to set aside the service of the summons are the affidavits of J. C. Stubbs, the director of the defendant with whom the summons was left, of Henry Purcell, the attorney in this action for the defendant, and of Maxwell Evarts, the counsel for defendant. In the affidavits of Stubbs (Record, p. 74) and Evarts (Record, p. 103) it is stated positively and unequivocally that the defendant has done no business within this State, and has had no property or office within this State, since the 29th day of July, 1899. These affidavits are not upon information and belief, but on the knowledge of the affiants themselves. These statements are further strengthened by the fact appearing in both affi-

davits that the Central Pacific Railroad Company, on July 29, 1899, conveyed to the Central Pacific Railway Company, a corporation organized under the laws of Utah, all of the property and assets of the Central Pacific Railroad Company (see Appendix, p. 1).

This was done in pursuance of an arrangement entered into in accordance with the provisions of the Act of Congress, approved July 7, 1898, by which a commission was appointed for the purpose of negotiating an adjustment of the affairs of the Central Pacific Railroad Company.

The plaintiff in error filed no affidavits in opposition to the motion in the court below and possibly relied on affidavits filed in the state court. In none of the affidavits filed in the state court does it appear that the plaintiff claims that the defendant is doing business within the State of New York, nor is there any real contention that the defendant has any property in said State, as the suggestion can hardly be treated seriously that a suit brought by one Walter Morshead, a stockholder holding 100 shares of the stock of the Central Pacific Railroad Company against the estate of Collis P. Huntington seeking to recover some one hundred and

twenty-five millions of dollars from his executors can be considered property within New York State of the Central Pacific Railroad Company. This is the sole suggestion that there is within the limits of the State of New York any property of the defendant. If every action brought by a stockholder against third parties in whatever State of the Union it may be brought can be construed to be the property of the corporation in that State, it certainly should be limited to cases in which final judgment had been obtained in such action. Even if such an action could be given serious consideration and be thought of as the property of the defendant in this case, then certainly it would have passed under the conveyance from the Central Pacific Railroad Company to the Central Pacific Railway Company, which latter company acquired all the property and assets of the defendant in error.

By the agreement between the Central Pacific Railroad Company and the Central Pacific Railway Company of July 29, 1899 (Exhibit "A" attached to affidavit of Maxwell Evarts, verified November 25, 1903, and printed at p. 1 of the appendix to this brief), the Central Pacific Rail-

road Company after conveying to the Central Pacific Railway Company certain specified properties made an assignment and transfer to the latter company of

> "ELEVENTH. All other properties, claims, demands, moneys, chooses in action, leaseholds, rights, privileges and franchises owned by or belonging to the party of the first part or to which it is in any wise entitled."

This conveyance was entered into in pursuance of an agreement between the United States of America, the Central Pacific Railroad Company and Messrs. Speyer & Company, dated February 1, 1899 (Appendix to brief, p. XIII). From this transfer, it is clear that if the claim of Morshead against the Huntington estate could possibly be considered property of the Central Pacific Railroad Company, it was transferred to the Central Pacific Railway Company at the time of the conveyance of July 29, 1899.

The unequivocal statements of Stubbs and Evarts, not on information and belief, but of their own knowledge, that the Company has no office in the State of New York, must, we think, be given greater weight than a statement on information and belief made by a process server,

who had been making investigations in the office of the Southern Pacific Company at the request of the plaintiff in this case, and who was unable to swear to anything more than the following:

> "That he proceeded on that day with said summons in his possession to the office of the Southern Pacific Railroad Company, at 120 Broadway, Manhattan, New York City, *which said office was also the office of the Central Pacific Railroad in New York*, and made inquires in said office for J. C. Willcutt, the Secretary, and N. T. Smith, the Treasurer, of the said Central Pacific Railroad Company, but that deponent was there informed that neither said Willcutt nor said Smith were in New York, but that they resided and had their places of business in the City of San Francisco, in the State of California" (Affidavit of Andrew Hunter, June 8, 1903, Record, p. 87).

The statement of Andrew Hunter, not even on information and belief, is supposed to be corroborated by the statement of Ellis L. Aldrich to the following effect:

> "That on or about the 6th day of April,

1903, deponent sent Andrew Hunter, whose affidavit is hereto attached, to inquire at the office of the Southern Pacific Railroad Company, *which is also the office of the Central Pacific Railroad Company*, for J. L. Willcutt and N. T. Smith, but that the said Andrew Hunter was there advised that the said Willcutt and Smith were not expected in New York and that there was nothing to bring them here; that they very seldom came to New York" (Record, p. 49).

Mr. Aldrich also made an affidavit on May 15, 1903. After referring to the service by him of the summons upon Mr. Stubbs he said:

"That deponent has also called at the office of the Southern Pacific Railroad Company in the Borough of Manhattan, City of New York, and was there informed that that was also the office of the defendant Central Pacific Railroad Company. That deponent was further informed at the said office that none of the officers of the defendant Central Pacific Railroad Company resided or had his place of business in the State of New York, but that all the officers of the said Central Pacific Railroad Company resided and had their places of business in the

western part of the United States" (Aldrich Affidavit, May 15, 1903, Record, p. 87).

The statements of these process-servers, not even made upon information and belief, can hardly be considered as against the clear, certain and unequivocal statement of a director of the company that it has no office in New York. Mr. Remington, however, upon his own affidavit, disposes of the matter. He says as follows:

> "That the defendant had an office for the transaction of business of said corporation, in the City of New York, State of New York *until in or about the year 1900.*" (Affidavit of Frederick H. Remington, verified May 16, 1903; Record, p. 90).

The only possible inference from this statement is that the Central Pacific Railroad Company ceased to maintain an office in the City of New York after the year 1900.

We therefore have a case in which Stubbs a director of the defendant (not an officer thereof), whose residence is at Chicago, came to the City of New York for a few days on business connected in no way with the business of the Central Pacific Railroad Company and was served with the summons in this action. In other words

Stubbs came to New York as an individual and not in his capacity as director of the Central Pacific Railroad Company. We have the further fact that the company has gone out of business and has been out of business since July, 1899, and we have the additional fact that it has no property or office in the State of New York. Does a service of the summons upon the director of the defendant under the circumstances stated properly bring the defendant before the court?

We respectfully submit that under the conditions just recited this Court has held more than once that such service of a summons must be set aside. The reason which underlies the decisions of this Court upon the question is the injustice of claiming that a company is within a state where it has no property and does no business, because an officer thereof comes into that state, not in his capacity as an officer of that company, but as an individual, and for the purposes of a private individual and for such purposes alone.

This Court has so held notwithstanding any decisions of state courts to the contrary and the last expression of the Court upon this question is found in the case of *Conley* vs. *Mathieson Alkali Works*, 190 U. S., 406. In the Conley case

the summons and complaint were served in the Supreme Court of the State of New York upon directors of the Mathieson Alkali Works, who were residents in such state. The case was removed to the federal court and a motion made to set aside the service of the summons. There was some conflict in the affidavits as to whether the defendant had ceased to do business in the State of New York and this question was referred by the court to a Referee. It was held by the Referee that the defendant had ceased to do business in the State of New York at the time the summons and complaint were served upon the directors of the defendant. The lower court thereupon set aside the service of the summons. The judgment below was affirmed by the Supreme Court of the United States and the decision of that court is embodied in the syllabus which is to the following effect:

> "Service in New York of a summons upon a director of a foreign corporation who resides in New York is not sufficient to bring the corporation into court where, at the time of service, the corporation was not doing business in the State of New York."

It is to be noted that the present case is stronger

than the Conley case for the reason that the director here served was not a resident of New York, but was incidentally there on business in no way connected with the business of the defendant.

A similar question arose in the case of *Goldey* vs. *Morning News Co.*, 156 U. S., 518. The defendant in the Goldey case was a Connecticut corporation. The summons and complaint were served in an action in the State Court of New York upon the president of the defendant who happened to be temporarily in New York. The Morning News Company did no business in New York and had no property in New York. The case was removed from the state court to the federal court and a motion made to set aside the service of the summons. The motion was granted and the order granting it was affirmed by this Court.

The ground of the decision of these cases is perhaps best expressed by a quotation from the decision of the Supreme Court in *St. Clair* vs. *Cox*, 106 U. S., 350–359, where it was said:

> "In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former

State, the Supreme Court of New Jersey said, that a law of another State which sanctioned such service upon an officer accidentally within its jurisdiction was '*so contrary to natural justice and to the principles of international law, that the courts of other States ought not to sanction it.*' "

See, also, to the same effect,

Wabash Western Railway vs. *Brow*, 164 U. S., 271.

St. Clair vs. *Cox*, 106 U. S., 350.

Clews vs. *Woodstock Iron Co.*, 44 Fed. Rep., 31 (Judge LACOMBE).

Bentlif vs. *Finance Corporation*, 44 Fed. Rep., 667 (Judge WALLACE).

Reifsnider vs. *Publishing Co.*, 45 Fed. Rep., 433.

The fundamental principle of the foregoing cases is well stated by Judge EVANS in the case of *Swann* vs. *Mutual Reserve Fund Life Association*, 100 Fed. Rep., 922–925, as follows:

"This rule is based, not only upon the essential principles of the law of corporations, but upon the fundamental doctrine that such service would not be due process of law. *An officer of a corporation however high in grade, when casually away from the home of the corporation, does not carry with him out of the home jurisdiction of his com-*

pany, his official character, authority, or responsibilities, because it is not so intended by his principal. In short, under these circumstances, he does not represent his company, although he is its president, its highest officer, and its most powerful agent."

It is, therefore, clear that, under the foregoing authorities, the motion to set aside the service of summons in this case was properly granted, unless the defendant is to be denied this right because in the state court before the removal and before it had the right of removal, the defendant made a motion to set aside the service of the summons. Before considering this question it must be remembered that the question raised in the state court by the plaintiff was not raised at a time when the defendant had the alternative of making the motion either in the state or federal court *and also that the motion made by the defendant in the state court had not finally been determined there against it.* It is true that at a Special Term the motion had been denied, but an appeal was pending from the interlocutory order denying such motion at the time the case was removed to this court and this case comes to this court with the question of the service of

the summons still open and pending. The defendant is, therefore, in no different situation than it would have been if the motion had been made in the state court to set aside the service of the summons and the case immediately removed to the federal court. In other words, the question of whether the service was a good service or not was just as much open in this case as in such a case as that suggested.

It has been held by the federal courts many times that a case begun in the state court, in which a motion has been made to set aside the service of the summons, can be removed to the federal court and the motion then made in that court.

In *Morris* vs. *Graham*, 51 Fed. Rep., 53, it appeared that the defendant "entered a special appearance in the state court for the purpose of contesting the validity of the service, and before the question was decided removed the cause to this court [federal court], leaving that question still pending," and upon the question in controversy in the present case the court held, as appears by the Syllabus, as follows:

> "Where defendants enter a special appearance in the state court for the purpose of

> contesting the validity of service, and subsequently remove the cause to a federal court, such removal, even though it should be considered as equivalent to a general appearance, does not preclude the court from examining the legality of the original service; for, while a general appearance is a waiver of mere irregularities of service, the court may at any time dismiss the case for any illegality rendering the service void."

In *McGillin* vs. *Claflin*, 52 Fed. Rep., 657, the same question was again decided, and it was held that

> "A non-resident defendant, who files in the state court a special appearance, for the purpose of objecting to the jurisdiction, and subsequently removes the cause to a federal court, expressly disclaiming in his petition for removal any purpose to enter a general appearance, does not by such removal waive the jurisdictional question, but may renew the same and have it determined by the federal court" (Syllabus).

In *Donahue* vs. *Fire-Clay Co.*, 94 Fed. Rep., 23, a motion in the state court to set aside the service of the summons was pending at the time of removal.

In *Tortat* vs. *Mining Co.*, 111 Fed. Rep., 426, a motion in the state court to set aside the summons was also pending at the time of removal.

The same is true of the case of *Kauffman* vs. *Kennedy*, 25 Fed. Rep., 785.

In *Miner* vs. *Markham*, 28 Fed. Rep., 387, the defendant was a member of Congress from California on his way to attend a session of Congress in the following December. He was traveling with his family and stopped at a place in Wisconsin to visit his brother. His children were ill and he remained in Wisconsin for several days. During that time he was served with a summons in the state court. He moved in the state court to set aside the service of the summons. *The motion was denied.* He then removed the case to the federal court, renewed the motion and the motion was granted. The court held as follows:

> "Where a defendant appears specially in the state court, both in his motion to set aside a service of summons, and in his application for the removal of the case to the United States court, and the motion in the state court is denied without prejudice to a renewal of the same, the defendant has

not waived his privilege, and can assert it in the United States circuit court with the same force and effect as if the suit has been brought and the motion made there in the first instance." (Syllabus.)

It is true that in the Miner case just cited the state court denied the motion with leave to renew. We do not see that the leave to renew makes the case any different from the present case or from the cases of *Morris* vs. *Graham* and *McGillin* vs. *Claflin* just cited. The leave to renew simply meant that the matter was not finally determined in the state court. The question in the case at bar was still pending in the state court and not there finally determined by reason of the appeal to the Appellate Division. The whole point is this, was the question of the service of the summons still open and not finally determined in the state court. If so, it makes no difference whether it was open because a provision in the order that it was made without prejudice to the right to renew or because an appeal had been taken from such order to a higher court. In either event the question of jurisdiction by reason of the service of summons would be still open and pending in the state

court and under such circumstances it is squarely held by the foregoing authorities that the motion can be renewed in the federal court and will be granted if the facts so warrant.

The cases which we have cited go much further than is necessary in the present case. In all of the cases referred to the actions were removable controversies at the time the special appearances for the purpose of setting aside the summons were entered in the state courts. The defendants, while having the alternative of removal to the federal court, elected to make their motions in the state court, and yet it was held that upon removal the motion to set aside the summons could again be made in the federal court.

The case at bar, however, was not a removal controversy at the time the defendant specially appeared in the state court, and the defendant then had no power of election whether it should make its motion in the state court or in this Court. It did not then have the power to remove the case, for this Court has held in *Powers* vs. *Railway Co.*, 169 U. S., 92, 100, that "so long as there does not appear of *record* to be any removable controversy, no party can be entitled to remove it." The defendant, therefore, in this case

at the time it specially appeared in the state court had no option, but was obliged to submit the question to the state court or else lose the right by a general appearance to ever thereafter raise the question in any court. The defendant yielded to the inevitable and did what it could, knowing that the federal courts had always held such a service as appears in the present case not "due process of law," but being then unable to bring the case to that jurisdiction. The defendant was obliged to raise the question in the state court. The motion in the state court was not of the defendant's seeking, but was made there under compulsion and, because the action was not then of record a removable controversy under the decision in the Powers case (169 U. S., 92, 100).

The defendant is no more bound by a decision in the state court before the case became a removable controversy and when it had no volition in the matter than is a defendant, who is compelled to litigate a case in the state court after the case has been removed to the federal court, because of the fact that the state court declines to acquiesce therein and continues to adjudicate the case in the state court. In such

a situation this court has held in *Kern* vs. *Huidekoper*, 103 U. S., 485, that

> "Where a state court, proceeding to the trial of a suit which had been removed therefrom, renders judgment against the party, whose petition for a removal it erred in refusing to grant, he may raise here the question as to the jurisdiction of that court, notwithstanding the fact that he appeared at the trial and insisted upon the merits of his cause of action or defense" (Syllabus).

The court said at page 492 as follows:

> "The fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the state court to try the case."

We most respectfully submit that the denial of a motion in the state court obtained by a defendant in that court by compulsion because his case is not then of record a removable controversy does not prevent the defendant from raising the question again in the federal court, especially when an appeal is pending in the state court from the order denying the motion. There is no authority which so holds and we claim

that the due removal of this case to this court as soon as it became a removable controversy,

> "enables the defendant to avail himself, in the circuit court of the United States of any and every defense, duly and seasonably reserved and pleaded, to the action, 'in the same manner as if it had been originally commenced in said circuit court'" (*Goldey* vs. *Morning News*, 156 U. S., 518, 525).

The defendant in this action has certainly "duly and seasonably reserved" in the state court the point that the service of the summons was not a valid one and that the court had no jurisdiction over the defendant by reason thereof, and under the ruling of the supreme court is now entitled to raise it in this court.

Further than that, the motion in the court below was made upon evidence which was not before the state court. The papers printed in the Appendix to this brief were not introduced in the state court and would alone have been sufficient ground upon which to renew the motion in that court. Such right of renewal certainly cannot be lost by removal. A defendant is not worse off by reason of removal, than he would otherwise be.

Reply to Brief of Plaintiff in Error (pages 91 et seq.) on Motion to Set Aside the Service of the Summons.

I.

In Point IX. of his brief the plaintiff in error insists that a federal court does not sit as a Court of Error to review the decisions of the state court. He then cites several authorities in the federal courts in which it is held that a defendant who has been served with a summons and *complaint*, and who, therefore had the alternative of raising the question of the service of the summons either in state or federal court lost that right upon removal to the federal court, if he had first made the attempt in the state court and the motion had been finally determined against him.

It is hardly necessary to point out the clear line between the cases cited by the other side and the case at bar. In every case referred to by counsel for the plaintiff in error the question raised by the defendant in the state court as to the service of the summons was not an open question at the time the action was removed to the federal court. It had been determined against the defendant and the determination acquiesced in and the defendant then removed

the case and renewed the motion. Such is not the situation of the case at bar, for here the question was not finally determined and was on appeal in the state court at the time of removal. A further most important and vital difference between the cases cited by the plaintiff in error and the case at bar is that in every case referred to by him a *complaint* had been served upon the defendant, and at the time he made his motion in the state court he knew that the case was one removable to the federal court and notwithstanding elected to try the question in the state court. It is unnecessary to repeat here what has been said so often, viz.: That at the time the motion was made in the case at bar in the state court and at the time of the appeal from the order denying that motion the defendant and its attorneys did not know and had no means of knowing that the case was one which the defendant was entitled to remove and try in the federal court under the provisions of the statutes of the United States. It was not then a removable case under the decision of *Powers* vs. *Railroad Company*, 169 U. S., 92, 100, as it did not appear of *record* to be a removable controversy until October 23, 1903.

The fact that this action was not a removable

controversy at the time the motion was made in the state court to set aside the summons presents an unanswerable difference between the case at bar and the cases cited by plaintiff in error on page 92 and the following pages of his brief. In all of the cases referred to by the other side the action was a removable controversy at the time the motion was made and decided. The defendants had the option of raising the question in the state court or federal court and elected the former. No such situation is presented here. The defendant in the case at bar had no choice, but was compelled to make his motion in the state court or else lose his right to even make it in any court by appearing generally. The action at the time of the motion was not a removable controversy. The defendant had not then the right to bring it to this court, for "so long as there does not appear of record to be any removable controversy, *no party* can be entitled to remove it" (*Powers* vs. *Railway Co.*, 169 U. S., 92, 100).

Whatever, therefore, was done by the defendant in the state court was done, not from choice, but from compulsion, not from volition, but from necessity. There was no election of forums.

On the contrary, the defendant was forced to make the motion in the state court and to take the appeal. The moment an opportunity for a choice was open it was at once acted on without awaiting a decision on the appeal to the Appellate Division, and the case brought to this court. It is, therefore, most earnestly insisted that the authorities referred to by plaintiff have no bearing whatever in the present discussion.

The cases relied upon by the plaintiff are: *Loomis* vs. *Carrington*, 18 Fed. Rep., 97; *Bragden* vs. *Perkins-Campbell Co.*, 82 Fed. Rep., 338; *Allmark* vs. *Platte Steamship Co.*, 76 Fed. Rep., 615; *Denison* vs. *Shawmut Mining Co.*, 124 Fed. Rep., 860; *Brooks* vs. *Farwell*, 4 Fed. Rep., 166; *Duncan* vs. *Gegan*, 101 U. S., 810.

We will examine these cases in detail; In *Loomis* vs. *Carrington*, *supra*, it appears that the motion to dismiss the writ was argued and denied. No appeal was taken from the order denying the motion and at the time of removal the question was no longer an open one, but had been acquiesced in by defendant. Further than that, the action was a removable controversy at the time the motion to dismiss was made in the state court.

In *Bragden* vs. *Perkins-Campbell Co.*, *supra*, the motion to set aside the service of the summons was denied by the state court and no appeal taken from the order denying the motion. At the time, therefore, of removal the question had been determined against the defendant and was no longer open. It also appears that, at the time the motion was made in the state court, the case was removable to the federal court, as the last three lines of the decision show that the complaint was served with the summons, inasmuch as the defendant upon the denial of its motion to set aside the service of the summons was given thirty days within which to plead.

In *Allmark* vs. *Platte Steamship Co.*, *supra*, the defendant moved to set aside the service of the summons in the state court and the motion was denied. No appeal was taken from the order denying the motion and the question was of course no longer open at the time the action was removed to the federal court, but had been acquiesced in by the defendant. It also appears from a decision in the same case reported just before the one cited by plaintiff in error that a complaint was served with the summons and that at the time the defendant made its

motion in the state court the case was one which could be removed into the federal court.

In *Denison* vs. *Shawmut Mining Co.*, *supra*, it appeared that a motion had been made in the state court and denied, and that in the federal court after removal a motion was made for the rehearing of such motion. From the decision of the court it is to be gathered that there was no appeal in the state court from the order denying the motion to set aside the attachment. The question was therefore ended in the state court and acquiesced in there by the defendant. It also appears that at the time of the motion to set aside the service the case was one removable to the federal court, and that on the motion for rehearing in the federal court no new evidence was introduced as in the case at bar.

Brooks vs. *Farwell*, *supra*. This case seems to have nothing to do with the question. It was a motion by the plaintiff after removal to the federal court asking for judgment, claiming that the answer of the defendant could not be received. The motion was denied. The quotation in the plaintiff's brief does not of course pretend to determine the point raised by us in the present case.

The authority of *Duncan* vs. *Gegan*, 101 U. S., 810, referred to by the plaintiff, does not seem to be of any importance, as the question here presented does not there appear. The Duncan case arose under the old Act of Congress of 1875, and simply held that a question which had been finally settled upon *an appeal* in the state court could not be re-opened in the federal court. The difference between this case and the Duncan case is, of course, obvious. The question in the case at bar had not been settled "on appeal," but was still open and pending "on appeal" in the state court at the time of the removal to the federal court.

The plaintiff is mistaken in thinking that we are asking this court to review the decision of the state court. We are simply presenting to this court, as if the case had originally commenced in this court, a question which was open and pending in the state court at the time of the removal of the case. This, under the decisions referred to in our brief, we have the right to do.

It was certainly so held in *Goldey* vs. *Morning News*, 156 U. S., 518–525, when this court said, at page 525, as follows:

"Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; *but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defence, duly and seasonably reserved and pleaded to the action, 'in the same manner as if it had been originally commenced in said circuit court.'* "

II.

In answer to the suggestion of counsel for the plaintiff in error that a federal court does not sit as a court of error, we call the attention of the court to the discussion of this question in the case of *Bryant* vs. *Thompson*, 27 Fed. Rep., 881, in which it was claimed that the federal court did not sit as an appellate tribunal or court of error, and, therefore, could not reverse an interlocutory order of the state court. This contention was, however, overruled, although in the particular case before the court it decided not to reverse the order of the state court for the reason that the federal court thought such order was

right. In the course of the opinion, it was said as follows:

> "It is argued by counsel that this court does not sit as an appellate tribunal in cases transferred from the state court, but takes them, and proceeds with them to final determination, just as they come from the state court; and, therefore, it is insisted that it is not competent here to review or reverse any proceeding that may have been had in the state court before the removal of the cause into this court. I am aware that this language is to be found in the decisions of some federal courts, but without proper qualtification it is misleading. It is true that in removal cases the United States circuit court does not sit as a court of errors, and as such it cannot review and reverse the interlocutory orders and decisions of the state courts. *But it is nevertheless competent for the circuit court to set aside or modify any interlocutory orders or decisions made in the state court before removal, when it satisfactorily appears that such orders are erroneous.* The circuit court after the removal certainly has the same power over the decisions made in the state court that it has over its own past rulings and orders in the cases commenced originally before it.

If a case transferred had remained in the state court, it would have been entirely competent for that tribunal to have changed, modified or set aside its own orders, when satisfied that they were erroneous. Thus, if the state court had granted a temporary injunction, it would have been competent for the same court, upon a proper showing to set it aside. If it had, upon a proper hearing, denied a motion to dissolve an injunction, it would have been entirely competent for it to entertain another motion to dissolve, and to grant such second application upon a satisfactory showing. So, if a state court denies an application to remove or discharge a receiver, it may, so long as the cause is still before it, with competent jurisdiction, entertain and grant a subsequent motion for the same purpose. The same may be said of all its interlocutory orders.

"Now, when a cause is removed from the state court to the United States circuit court it stands in the latter just as it stood in the state court before removal. All orders and rulings in the state court remain in full force until they are changed or set aside in the circuit court. But the circuit court, certainly, has the same power over them—

the same jurisdiction to modify them or set them aside—that the state court would have had if the cause had not been removed. *Interlocutory orders made in the State Court clearly do not, by virtue of their removal to the United States Circuit Court, receive any such additional force and effect as to preclude the circuit court from doing with them what the state conrt might have done if the cause had remained there.* The circuit court certainly has the same power over interlocutory orders and decrees made in the state court before removal that it might exercise over its own past decretal orders and decisions in a cause originating before it."

The value of the reasoning in the opinion just quoted is in no way detracted from because in the particular case then before the court it thought it proper not to reverse the order of the state court. The soundness of the reasoning is apparent when it is considered that if the case at bar had remained in the state court the order denying the motion would probably have been reversed on the appeal to the Appellate Division. It cannot be that the right to set aside such order or to renew the motion is lost because of removal, when it was not lost in the state court.

In the consideration of this matter it is important to recollect that the order in the state court was an interlocutory order only, and in no way final, from which an appeal was pending in the state court at the time of removal. The right and advantages of such appeal are certainly not lost by removal, when the question goes to the jurisdiction of the court over the person of the defendant. A removal to the federal court has never been construed as taking away from a litigant rights which he had in the state court.

III.

The motion to set aside the service of the summons in the court below was made upon evidence which was not before the state court. The two papers which are attached to this brief as an appendix were made part of one of the affidavits on which the motion was made to set aside the service of the summons in the federal court (Record, pp. 103–104). These papers show conclusively that there was no ground for any claim that the Central Pacific Railroad Company had any property in the State of New York. There was no opinion written in the state court denying the motion to set aside the service of

the summons, and for all that appears, the court may have had some doubt upon this point. This question was entirely removed in the federal court by the new evidence in the case which would have been perfectly competent and sufficient evidence upon which to make a motion in the state court for a reargument or for leave to renew the motion to set aside the service of the summons.

The authorities referred to on page 93 and the following pages in the brief of plaintiff in error all state that a motion can be made in the federal court, if made for reasons which did not appear upon the previous argument in the state court.

The point in this case is that the question at the time of the removal into the federal court was not settled and determined in the state court. We would have had a right to continue the presentation of the question in the state court, if the case had not been removed. Certainly by such removal, the defendant cannot have lost its right, especially in view of the fact that the motion was renewed in this court upon additional evidence which was not before the state court.

FOURTH POINT.

The answer to all these questions seems to be that this court is not the place for their discussion. The case should have been taken to the Circuit Court of Appeals for the purpose of there raising all of these questions. This court is without jurisdiction of the case for the reasons given in our first point, as it is not possible to maintain that any of the questions arising in the second and third points in this brief in any way tend to show that the court below did not have jurisdiction of the case as a federal tribunal, but on the contrary that the case was dismissed for want of jurisdiction of the person of the defendant; that is to say, for want of jurisdiction as a judicial tribunal. In addition, the ground of the motion to remand was not that the court did not have jurisdiction of the case as a federal court, as that was conceded by the plaintiff in error, inasmuch as there was the requisite difference of citizenship and a sufficient amount involved. In other words, the motion to remand was made upon technical grounds on the theory that in some manner the defendant had lost the right to file the petition for removal, or that the

petition for removal was not filed and presented in a proper manner to the state court.

These questions are properly for the circuit court of appeals to determine, and not for this Court, which under its later decisions, has no jurisdiction of a case brought direct from the circuit court under the provisions of the Judiciary Act of 1891, except when such case was dismissed upon the ground that the court below had no jurisdiction as a court of the United States, or the motion to remand was rested upon the contention that there was a lack of jurisdiction in the federal court as contradistinguished from the state court (*Courtney* vs. *Pradt*, decided January 3, 1905).

FIFTH POINT.

The judgment of the court below should be affirmed.

MAXWELL EVARTS,
Of Counsel for Defendant in Error.

APPENDIX.

Indenture transferring all the property of the Central Pacific Railroad Company, the defendant in error, to the Central Pacific Railway Company, Referred to on page 103 of the Record.

EXHIBIT "A."

AN INDENTURE AND AGREEMENT, made and entered into the twenty-ninth day of July, one thousand eight hundred and ninety-nine, by and between the CENTRAL PACIFIC RAILROAD COMPANY, a corporation created, organized and existing under the laws of the State of California, and invested with certain rights and franchises by and under the laws of the United States of America, and by and under the laws of the States of Utah and Nevada, party of the first part, and the CENTRAL PACIFIC RAILWAY COMPANY, a corporation created, organized and existing under and by virtue of the laws of the State of Utah, of the second part:

WHEREAS, the party of the first part is the owner of the lines of railroad, the railways and other properties, rights, privileges and franchises, and the lands and notes and securities and moneys, hereinafter in the granting clause hereof described or referred to; and,

WHEREAS, certain portions of the said lines of railroad and railways and their appurtenances, and said lands, owned by the said party of the first part, are subject to the liens of certain mortgages severally and respectively securing bonds now outstanding (hereinafter called "outstanding old bonds") for the several aggregate principal sums following, to wit:

(a) The Central Pacific Railroad Company of California First Mortgage Bonds, secured by mortgage dated July 25, 1865, of the several series and for the

amounts and now matured or maturing at the dates hereinafter stated, respectively, viz.:

Series.	Amount.	Date of Maturity.
Series A	$2,995,000	Matured.
B	$ 1,000	Matured.
	$ 999,000	December 1, 1899.
C	$ 4,000	Matured.
	$ 996,000	December 1, 1899.
D	$ 4,000	Matured.
	$1,379,000	December 1, 1899.
Total	$6,378,000	

(b) The Central Pacific Railroad Company of California First Mortgage Bonds, secured by mortgage dated January 1, 1867, of the several series and for the amounts and now matured or maturing at the dates hereinafter mentioned, respectively, viz.:

Series.	Amount.	Date of Maturity.
Series E	$ 5,000	Matured.
	3,990,000	June 1, 1900.
F	$ 9,000	Matured.
	$3,990,000	June 1, 1901.
G	$ 13,000	Matured.
	$3,985,000	June 1, 1901.
H	$ 6,000	Matured.
	$3,993,000	June 1, 1901.
I	$ 13,000	Matured.
	$3,498,000	June 1, 1901.
Total	$19,502,000	

(c) The Western Pacific Railroad Company First Mortgage Bonds, secured by mortgage dated July 1, 1869, of the several series and for the amounts and which matured at the date hereinafter mentioned, viz.:

Series A for	$1,970,000	Matured July 1, 1899.
B "	765,000	" " " "
Total	$2,735,000	

(d) The California and Oregon Railroad Company, and Central Pacific Railroad Company, successor, First Mortgage Bonds, secured by mortgages dated January 1, 1868 and January 1, 1872, respectively, of the several series and for the amounts and maturing at the date hereinafter mentioned, viz.:

Series A for	$5,982,000	Maturing January 1, 1918
B "	$4,358,000	" " " "
Total	$10,340,000	

(e) The Central Pacific Railroad Company First Mortgage Bonds (San Joaquin Valley Division), secured by mortgage dated October 1, 1870, for the amount of $6,080,000, maturing October 1, 1900.

(f) The Central Pacific Railroad Company Fifty-Year Five Per Cent. Bonds, secured by mortgage dated April 1, 1889, to the amount of $12,283,000, maturing April 1, 1939, of which bonds the amount of $2,038,000 are held as security for the Land Bonds next hereinafter mentioned.

(g) The Central Pacific Railroad Company Land Bonds, secured by mortgage dated October 1, 1870, to the amount of $2,134,000 and maturing October 1, 1900.

AND, WHEREAS, heretofore and under date of February 1, 1899, the said party of the first part (in pursuance of a Settlement Agreement between the United States of America, the said party of the first part, and Messrs. Speyer & Co., dated February 1, 1899, entered into under the provisions of an Act of Congress, approved July 7, 1898) executed its twenty promissory notes in favor of the United States of America for $2,940,635.78 each, maturing on or before the expiration of each successive six months from the date thereof; and,

WHEREAS, the said party of the first part is also indebted to the holders of its bonds to the amount at their face value of $56,000, bearing date October 1, 1886, and payable October 1, 1936, with six per cent.

interest, payable semi-annually, commonly known and referred to as "Fifty-year Bonds of 1936."

AND, WHEREAS, under and by virtue of authority from the States of California, Utah and Nevada, the party of the first part has sold to the party of the second part hereunder, subject to the liens now existing thereon, and upon and subject to the terms and conditions hereinafter prescribed, all the lines of railroad, railways and other properties and rights, privileges and franchises, and lands, notes, securities and moneys hereinafter in the granting clause hereof described and referred to, and any and all other properties, claims, demands, choses in action, rights, privileges and franchises of the said party of the first part:

NOW, THEREFORE, THIS INDENTURE WITNESSETH, That, in consideration of one dollar, which, simultaneously with the execution hereof, has been paid by the party of the second part to the party of the first part, the receipt whereof by said party of the first part is hereby acknowledged, and for and in consideration of the undertakings, covenants and agreements on behalf of the said party of the second part hereinafter contained, said party of the first part has granted, bargained, sold, conveyed, assigned, transferred and set over, and hereby grants, bargains, sells, conveys, assigns, transfers and sets over, unto the party of the second part:

FIRST. The lines of railroad owned by the party of the first part, extending from a point about five miles west of Ogden, in the State of Utah, through the States of Utah, Nevada and California, to and into the City of Sacramento, in the State of California, and from said Sacramento to San José, in said last mentioned State, and from Niles to Oakland, and from Lathrop to Goshen, all in the State of California, and from Roseville, in said State of California, to the California and Oregon boundary; also the leasehold of the railroad from a point about five miles west of Ogden to Ogden, in the County of Weber in the State of Utah.

SECOND. All the railways belonging to the party of

the first part in San Francisco, Oakland and Alameda in the State of California, and the terminals belonging to the party of the first part, used in connection therewith, including wharves, piers, docks, embankments, ferries, steamers and transfer and ferryboats.

THIRD. All roadbeds, superstructures, rights of way, rails, tracks, side tracks, bridges, viaducts, terminals, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, coal houses, wood houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections and fixtures, and all other things of whatever kind, now owned by the party of the first part, which shall in anywise, or at any time, belong or appertain to, or be provided for use upon, or for the purposes of, any of said lines of railroad, and any and all other property, real or personal, of every kind and description, now owned by the party of the first part, for use upon or for the purposes of such lines of railroad or terminals, or any of them.

FOURTH. Any and all locomotives, engines, cars and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture and other chattels of the party of the first part now owned for use upon any of such lines of railroad or terminals or other property.

FIFTH. Any and all other railroads, equipment and terminals owned by the party of the first part.

SIXTH. Any and all corporate or other rights, privileges and franchises which the party of the first part now has, or hereafter shall acquire, possess or become entitled to, for, or appertaining to, the construction, maintenance, use or operation of, such lines of railroad or terminals or other property.

SEVENTH. Any and all the rents, issues, profits, tolls and other income of such lines of railroad or terminals or other property.

EIGHTH. All and singular the several sections of land granted by the United States to the Central Pacific Railroad Company of California by an Act of Congress approved on the first day of July, 1862, entitled "An

Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," and an act amendatory thereof, approved on the second day of July, 1864; also all the lands granted to the California and Oregon Railroad Company by an Act of Congress approved on the twenty-fifth day of July, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon;" and also all the estate, right, title, interest claim and demand whatsoever, at law or in equity, of, in or to the same or any part or parcel thereof, which the said party of the first part now has, holds, owns or is entitled to, or hereafter may or shall acquire, have, hold, own or be or become entitled to by force or virtue of the said Acts of Congress, saving and excepting all parts and parcels of said lands which were sold prior to the execution of the mortgage from the Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, dated the first day of October, A. D. 1870, securing the Land Bonds of said last-mentioned Company, and all such parts and parcels of said lands as shall have since been released from the said mortgage securing such Land Bonds in accordance with the provisions thereof.

NINTH. All notes now outstanding given in payment for lands covered by such mortgage of the Central Pacific Railroad Company, dated October 1, 1870, securing said Land Bonds.

TENTH. All securities and moneys which are held in any sinking fund created or existing by or under any mortgage existing on the 20th day of February, 1899, whether of the party of the first part or any divisional company by the consolidation whereof it was formed.

ELEVENTH. All other properties, claims, demands, moneys, choses in action, leaseholds, rights, privileges and franchises owned by or belonging to the party of the first part, or to which it is in any wise entitled.

TO HAVE AND TO HOLD, the premises, railroads, rail-

ways, properties real or personal, claims, demands, choses in action, leaseholds, rights, privileges, franchises, estates and appurtenances, lands, land notes and securities and moneys hereby granted, bargained, sold, conveyed, assigned, transferred or set over, or intended so to be, unto the party of the second part and to its successors and assigns forever, but subject to the liens thereon hereinbefore mentioned and referred to.

AND IN FURTHER CONSIDERATION HEREOF, and in order to provide for the readjustment of the present funded indebtedness of the party of the first part (subject to which the properties of said party of the first part are hereby conveyed), and for the purpose of securing the payment of the amounts becoming due on the Notes given by said party of the first part to the United States under said Settlement Agreement, dated February 1, 1899, as in said Settlement Agreement prescribed, the party of the second part has assumed and hereby assumes the payment of all the indebtedness and guaranties of the said parties of the first part, and has undertaken, covenanted and agreed, and hereby undertakes, covenants and agrees, to and with the party of the first part, that it will issue stocks and securities and execute mortgages as prescribed in the Central Pacific Readjustment Plan and Agreement dated February 8, 1899, issued by Speyer & Co., Speyer Brothers, Laz Speyer Ellissen, Teixeira de Mattos Brothers and the Deutsche Bank of Berlin, as Readjustment Managers, or as the same may be modified under the terms thereof and with the assent of the party of the second part, and in a certain Agreement bearing date the 20th day of February, one thousand eight hundred and ninety-nine, by and between F. G. Banbury, Esq., M. P., John B. Akroyd, Esq., Lord Alwyne Compton, M. P., Daniel Marks, Esq., and Joseph Price, Esq., as the London Committee of Central Pacific Shareholders, Messrs. Speyer & Company of New York, Messrs. Speyer Brothers of London, Mr. Laz Speyer Ellissen of Frankfort-on-the-Main, Messrs. Teixeira de Mattos Brothers of Amster-

dam, and the Deutsche Bank of Berlin, as Readjustment Managers as therein stated, and the Southern Pacific Company, and in a certain other Agreement bearing date the 1st day of March, one thousand eight hundred and ninety-nine, by and between August Belmont, Esq., Hon. John G. Carlisle and George Coppell, Esq., as the American Committee of Central Pacific Shareholders, the said Readjustment Managers and the Southern Pacific Company, and, under arrangements made or to be made with said Readjustment Managers will carry out such Readjustment Plan and said Agreements.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed on their behalf respectively by their respective Presidents, and their respective corporate seals to be hereunto affixed and attested by their respective Secretaries, the day and year first above written.

CENTRAL PACIFIC RAILROAD COMPANY,

By

{Seal of Central Pacific Railroad Company.} ISAAC L. REQUA, President.

Attest:

W. M. THOMPSON, Secretary.

CENTRAL PACIFIC RAILWAY COMPANY,

By

{Seal of Central Pacific Railway Company.} THOMAS MARSHALL, President.

Attest:

DAVID B. HEMPSTEAD, Secretary.

STATE OF CALIFORNIA, City and County of San Francisco, } ss.:

On this 29th day of July, A. D. 1899, before me, E. B. RYAN, a Notary Public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Isaac L. Requa, known to me to be the President, and W. M. Thompson, known

to me to be the Secretary, of the Central Pacific Railroad Company, the corporation described in and who executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office, in the City and County of San Francisco, the day and year in this certificate first above written.

E. B. RYAN,
(Notarial Seal.) Notary Public,
In and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss.:
City and County of San Francisco, }

On the 29th day of July, A. D. 1899, personally appeared before me Isaac L. Requa, who, being by me duly sworn, did say that he is the President of the Central Pacific Railroad Company, the corporation named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by resolution of its Board of Directors, and said Isaac L. Requa acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, in said City and County of San Francisco, on this 29th day of July, A. D. 1899.

E. B. RYAN,
A Commissioner of Deeds for the State of
[SEAL.] Utah, residing in the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, } ss.:
City and County of San Francisco, }

On this 29th day of July, A. D. one thousand eight hundred and ninety-nine (1899), before me E.

B. RYAN, a Commissioner of Deeds for the State of Nevada, duly appointed, commissioned and sworn, residing in the City and County of San Francisco and State of California, personally appeared the within-named Isaac L. Requa, President of the Central Pacific Railroad Company, and W. M. Thompson, Secretary of the Central Pacific Railroad Company, personally known to me to be the said officers of the said corporation, respectively, and the individuals described in and who executed the within instrument as such officers of said Company, and they each severally and personally then and there acknowledged to me that they executed the said within instrument as the free act and deed of the said Central Pacific Railroad Company, freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as such Commissioner, at my office in said City and County of San Francisco, the day and year last above written.

E. B. RYAN,
A Commissioner of Deeds for the State of Nevada, residing in San Francisco, California.

[SEAL.]

STATE OF UTAH,
County of Salt Lake, } ss.:

On this 31st day of July, A. D. 1899, before me, LULA GEOGHEGAN, a Notary Public in and for the County of Salt Lake, State of Utah, duly commissioned and qualified, personally appeared Thomas Marshall, known to me to be the President, and David B. Hempstead, known to me to be the Secretary, of the Central Pacific Railway Company, the corporation described in and which executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City

and County of Salt Lake, State of Utah, the day and year first above written.

LULA GEOGHEGAN,
Notary Public.

[Notarial Seal.]

My Commission expires September 17, 1901.

STATE OF UTAH, } ss. :
County of Salt Lake, }

On this 31st day of July, A. D. 1899, personally appeared before me Thomas Marshall, and David B. Hempstead, who, being by me respectively duly sworn, each for himself says that the said Thomas Marshall is the President of the Central Pacific Railway Company, and the said David B. Hempstead is the Secretary of said Company, one of the corporations named in the foregoing instrument, and that said instrument was signed in behalf of said corporation by said President and Secretary, respectively, under and in pursuance of a resolution of its Board of Directors; and the said Marshall and Hempstead respectively acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, in said County of Salt Lake, State of Utah, on this 31st day of July, A. D. 1899.

LULA GEOGHEGAN,
Notary Public.

[NOTARIAL SEAL.]

My Commission expires September 17, 1901.

STATE OF UTAH, } ss. :
County of Salt Lake, }

On the 31st day of July, A. D. 1899, before me, LULA GEOGHEGAN, a Notary Public in and for the County of Salt Lake, State of Utah, duly appointed and qualified, personally appeared the within-named Thomas Marshall, President of the Central Pacific Railway Company, and David B. Hempstead, Secretary of the said Central Pacific Railway Company,

personally known to me to be the said officers of the said corporation, respectively, and the individuals described in and who executed the within instrument as such officers of said Company, and they each severally and personally then and there acknowledged to me that he executed the said instrument as the free act and deed of the said Central Pacific Railway Company freely and voluntarily, and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as such Notary Public, at my office in said County of Salt Lake and State of Utah, the day and year last above written.

LULA GEOGHEGAN,
Notary Public.

[NOTARIAL SEAL.]

My Commission expires September 17, 1901.

Agreement between the United States and Central Pacific Railroad Company, Referred to on Pages 103 and 104 of the Record.

EXHIBIT "B."

AGREEMENT made and entered into the first day of February, 1899, by and between the United States of America, acting by Honorable Lyman J. Gage, Secretary of the Treasury; Honorable Cornelius N. Bliss, Secretary of the Interior, and Honorable John W. Griggs, Attorney General, appointed by Act of Congress approved July 7, 1898, a Commission with full power to settle the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads, of the first part; the Central Pacific Railroad Company, a corporation created, organized and existing under the laws of the State of California and of the United States of America, of the second part, and Messrs. Speyer & Company, bankers, of the City of New York, of the third part.

WHEREAS, the Central Pacific Railroad Company, as now existing, was formed by the successive consolidations hereinafter mentioned, that is to say:

(a) Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company into a corporation named the Central Pacific Railroad Company, under Articles of Association and Consolidation dated June 22, 1870.

(b) Consolidation of the last-mentioned Central Pacific Railroad Company, the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Railroad Company and the San Joaquin Valley Railroad Company into a corporation named the Central Pacific Railroad Company, under Articles of Association and Consolidation dated August 20, 1870.

AND, WHEREAS, the said Central Pacific Railroad Company, party of the second part hereto, is the owner

of the following lines of railroad with their appurtenances, which are known as and called the "Bond-Aided Lines," viz.:

A. The line of railroad (about $737\frac{50}{100}$ miles in length), from a point about five miles west of Ogden to Sacramento, to aid in the construction of which bonds were from time to time issued by the United States to the Central Pacific Railroad Company of California to the amount in the aggregate of twenty-five million eight hundred and eighty-five thousand one hundred and twenty dollars ($25,885,120) under and in pursuance of the provisions of the Act of Congress of the United States, entitled "An Act to aid in the construc-"tion of a railroad and telegraph line from the Mis-"souri River to the Pacific Ocean, and to secure to the "Government the use of the same for postal, military, "and other purposes," approved July 1, 1862, the Act to amend the last-mentioned Act, approved July 2, 1864, and the Act to amend the above-mentioned Acts, approved March 3, 1865.

B. The line of railroad (about $123\frac{14}{100}$ miles in length) from Sacramento to San José, to aid in the construction of which bonds were from time to time issued by the United States to the Western Pacific Railroad Company to the amount in the aggregate of one million nine hundred and seventy thousand five hundred and sixty dollars ($1,970,560) under and in pursuance of the provisions of the same acts of Congress under which bonds were issued to the Central Pacific Railroad Company of California, as above stated.

AND, WHEREAS, the said Central Pacific Railroad Company is also the owner of the following lines of railroad in the State of California with their appurtenances, which are known as and called the "Non-Bond-Aided Lines," viz.:

C. The line of railroad (about $24\frac{31}{100}$ miles in length) from Oakland to Niles.

D. The line of railroad (about $146\frac{8}{100}$ miles in length) from Lathrop to Goshen.

E. The line of railroad (about $296\frac{50}{100}$ miles in length) from Roseville to the Oregon boundary;

AND, WHEREAS, the said "Bond-Aided Lines" of railroad are covered by the following mortgages and liens, viz.:

FIRST. The bond-aided line from Sacramento to the eastern boundary of California by the First Mortgage of the Central Pacific Railroad Company of California to D. O. Mills and William E. Barron, Trustees, dated July 25, 1865, under which bonds are now outstanding to the amount of their face value of six million three hundred and seventy-eight thousand dollars ($6,378,000), of which bonds to the amount of three million and seven thousand dollars ($3,007,000) are now overdue, and bonds to the amount of three million three hundred and seventy-one thousand dollars ($3,371,000) will mature December 1, 1899.

SECOND. The bond-aided line from the eastern boundary of California to a point about five miles west of Ogden by the First Mortgage of the Central Pacific Railroad Company of California to D. O. Mills and William E. Barron, Trustees, dated January 1, 1867, under which bonds are now outstanding to the amount at their face value of nineteen million five hundred and three thousand dollars ($19,503,000), of which bonds to the amount of eighty thousand dollars ($80,000) are now overdue, and bonds to the amount of three million nine hundred and eighty-eight thousand dollars ($3,988,000) will mature June 1, 1900, and bonds to the amount of fifteen million four hundred and thirty-five thousand dollars ($15,435,000) will mature June 1, 1901.

THIRD. The bond-aided line from Sacramento to San José by the First Mortgage of the Western Pacific Railroad Company to D. O. Mills and William E. Barron, Trustees, dated October 28, 1869, under which bonds are now outstanding to the amount at their face value of one million nine hundred and seventy thousand dollars ($1,970,000), and will mature July 1, 1899.

FOURTH. The bond-aided line from a point about five miles west of Ogden to Sacramento by the statutory lien in favor of the United States under the acts of Congress, approved July 1, 1862, July 2, 1864, and March 3, 1865, above-mentioned, securing the balance of the indebtedness to the United States (amounting

as of the date of this agreement, to the sum of $53,389,-052.74), resulting from the issue of bonds to the Central Pacific Railroad Company of California as aforesaid to aid in the construction of said bond-aided line, such statutory lien being by said acts subordinate to the liens of the First Mortgages of the Central Pacific Railroad Company of California, described in the preceding subdivisions First and Second of this recital.

FIFTH. The bond-aided line from Sacramento to San José by the statutory lien in favor of the United States under the Acts of Congress approved July 1, 1862, July 2, 1864, and March 3, 1865, above mentioned, securing the balance of the indebtedness to the United States (amounting as of the date of this agreement, to the sum of $5,423,662.74), resulting from the issue of bonds to the Western Pacific Railroad Company as aforesaid to aid in the construction of said bond-aided line, such statutory lien being by said act subordinate to the lien of the First Mortgage of the Western Pacific Railroad Company described in the preceding subdivision Third of this recital.

AND, WHEREAS, the said Non-Bond-Aided lines of railroad are covered by the following mortgages and liens, viz.:

FIRST. The non-bond-aided line from Oakland to Niles by First Mortgage from the Western Pacific Railroad Company to D. O. Mills and William E. Barron, Trustees, dated October 28, 1869, under which bonds are now outstanding to the amount at their face value of seven hundred and sixty-five thousand dollars ($765,-000), and will mature July 1, 1899.

SECOND. The non-bond-aided line from Lathrop to Goshen by First Mortgage from the Central Pacific Railroad Company to D. O. Mills and W. C. Ralston, Trustees, dated October 1, 1870, under which bonds are now outstanding to the amount at their face value of six million and eighty thousand dollars ($6,080,000), and will mature October 1, 1900.

THIRD. The non-bond-aided line from Roseville to the Oregon boundary by First Mortgage from the California and Oregon Railroad Company to David S.

Dodge and Eugene Kelly, Trustees, dated January 1, 1868, and the supplemental mortgage from the Central Pacific Railroad Company as successor of the California and Oregon Railroad Company (by consolidation as aforesaid) to Eugene Kelly and Philo C. Calhoun, Trustees, dated January 1, 1872, under which last mentioned mortgages bonds are now outstanding to the amount at their face value of ten million three hundred and forty thousand dollars ($10,340,000), the date of maturity of such last mentioned bonds having been extended to January 1, 1918, by virtue of extension agreements dated September 27, 1887, and September 25, 1891, respectively.

AND, WHEREAS, all of the said bond-aided and non-bond-aided lines above referred to are further covered by Mortgage from the Central Pacific Railroad Company to the Metropolitan Trust Company of the City of New York, Trustee, dated April 1, 1889, under which there are now outstanding Fifty-year Five Per Cent. bonds of said Central Pacific Railroad Company maturing April 1, 1939, to the amount at their face value of twelve million two hundred and eighty-three thousand dollars ($12,283,000), of which bonds to the amount at their face value of $2,038,000 are now held by the Metropolitan Trust Company of the City of New York as security for the outstanding Land Bonds hereinafter mentioned.

AND, WHEREAS, it is claimed by the United States, but not conceded by the other parties hereto, that under and by virtue of the provisions of an Act entitled: "An act to alter and amend the act entitled: 'An act "'to aid in the construction of a railroad and telegraph "'line from the Missouri River to the Pacific Ocean, "'and to secure to the Government the use of the "'same for postal, military, and other purposes,' ap-"proved July first, eighteen hundred and sixty-two, "and also to alter and amend the act of Congress "approved July second, eighteen hundred and sixty-"four, in amendment of said first-named act," approved May 7, 1878, the balances of indebtedness to the United States hereinbefore referred to amounting in

the aggregate as of the date of this agreement to the sum of $58,812,715.48 are also secured by lien declared in said last-mentioned act upon all the railroad lines above mentioned whether aided or non-aided;

AND, WHEREAS, the lands granted to the Central Pacific Railroad Company of California, by the Act of Congress of July 1, 1862, above mentioned, and the lands granted to the California and Oregon Railroad Company by act of Congress approved July 25, 1866, with the exceptions and reservations mentioned in the mortgage hereinafter mentioned, were mortgaged by the Central Pacific Railroad Company to Charles Crocker and Silas W. Sanderson, by mortgage dated October 1, 1870, to secure an issue of Land Bonds of the Central Pacific Railroad Company which matured October 1, 1890, a part of which were by Extension Agreement dated September 4, 1890, extended to October 1, 1900, and of which there are now outstanding bonds to the amount at their face value of $2,134,000;

AND, WHEREAS, by Act of Congress entitled "An Act "making appropriations to supply deficiencies in the "appropriations for the fiscal year ending June "thirtieth, eighteen hundred and ninety-eight, and for "prior years and for other purposes," approved July 7, 1898, it was among other things provided as follows, viz.: "That the Secretary of the Treasury, the Secretary of "the Interior, and the Attorney General, and their suc- "cessors in office, be, and they are hereby, appointed "a commission with full power to settle the indebted- "ness to the Government growing out of the issue of "bonds in aid of the construction of the Central "Pacific and Western Pacific bond-aided railroads, "upon such terms and in such manner as may be "agreed upon by them, or by a majority of them, and "the owners of said railroads: *Provided*, that any and "all settlements thus made shall be submitted in writ- "ing to the President for his approval or disapproval, "and unless approved by him shall not be binding."

"That said commission shall not agree to accept a "less sum in settlement of the amount due the United "States than the full amount of the principal and in-

"terest and all amounts necessary to reimburse the "United States for moneys paid for interest or other- "wise. *And also provided*, That said commission are "hereby empowered to grant such time or times of "payment by installment, and at such rates of interest, "to be not less than three per centum per annum, "payable semi-annually, and with such security as to "said commission may seem expedient. *Provided*, "*however*, That in any settlement that may be made "the final payment and full discharge of said indebt- "edness shall not be postponed to exceed ten years, "and the whole amount, principal and interest, shall "be paid in equal semi-annual installments within the "period so limited, and in any settlement made it shall "be provided that if default shall be made in any pay- "ment of either principal or interest or any part "thereof then the whole sum and all installments, "principal and interest shall immediately become due "and payable, notwithstanding any other stipulation "of said settlement: *Provided, further*, That unless the "settlement herein authorized be perfected within one "year after the passage of this Act, the President of "the United States shall at once proceed to foreclose "all liens now held by the United States against said "railroad companies and to collect the indebtedness "herein sought to be settled, and nothing in this Act "contained shall be held to waive or release any right, "lien, or cause of action already held by the United "States.

"That there is hereby appropriated out of any "money in the Treasury, not otherwise appropriated, "the sum of twenty thousand dollars to defray the "expenses of said commission in making the said "settlement."

AND, WHEREAS, it has been agreed by and between the Commission appointed by said Act and the owners of the railroads above described, that the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads should be settled upon the terms and in the manner hereinafter agreed

to, subject to the approval of the President of the United States as provided in said last-mentioned Act.

AND, WHEREAS, Messrs. Speyer & Company, from time to time negotiated the sale of large amounts of the bonds secured by mortgage upon the railroads of the Central Pacific Railroad Company above mentioned, and are desirous of co-operating in a settlement of all matters relating to or affecting the indebtedness of said Company and the adjustment of its affairs.

AND, WHEREAS, of the First Mortgage Bonds of the Central Pacific Railroad Company of California secured upon the bond-aided lines above mentioned, and amounting in the aggregate, at their face value to twenty-five million eight hundred and eighty-one thousand dollars ($25,881,000), there have been already deposited and still remain on deposit subject to the order of Messrs. Speyer & Company, bonds to the amount at their face value of twenty-five million six hundred and thirteen thousand dollars ($25,613,000) under a Bondholders Agreement, dated August 14, 1897, a copy whereof has been furnished to the party of the first part hereto.

AND, WHEREAS, of the Central Pacific Railroad Company's Fifty-Year Five Per Cent. Bonds, issued under the mortgage to the Metropolitan Trust Company of the City of New York, dated April 1, 1899, above mentioned, amounting in the aggregate (after deducting said bonds so as aforesaid held as security for the said Land Bonds), to the sum of ten million two hundred and forty-five thousand dollars ($10,245,000), there have been deposited and still remain on deposit subject to the order of Messrs. Speyer & Company, bonds to the amount, at their face value, of eight million six hundred and eighty-six thousand dollars ($8,686,000) under a Bondholders Agreement, dated October 1, 1897, a copy whereof has been furnished to the party of the first part hereto.

AND, WHEREAS, the owners of the bonds deposited under each of the aforesaid agreements of August 14, 1897, and October 1, 1897, have thereby authorized Messrs. Speyer & Company, in their behalf, to nego-

tiate with any other committees or representatives of holders of other securities of said Railroad Company, or with the Government of the United States, or otherwise, for participation in respect of the deposited bonds in any plan of readjustment or reorganization, or otherwise.

AND, WHEREAS, there have been deposited with Committees consisting of F. G. Banbury, M. P., John B. Akroyd, Lord Alwyne Compton, M. P., Daniel Marks and Joseph Price, in London, and August Belmont, Hon. John G. Carlisle and George Coppell, in New York, under agreements, copies of which have been furnished to the party of the first part, certificates of the Capital Stock of the Central Pacific Railroad Company, to the amount, at their face value, of at least thirty-eight million four hundred and one thousand eight hundred dollars ($38,401,800) out of a total outstanding Capital Stock of said Company, amounting, at its par value, to sixty-seven million two hundred and seventy-five thousand five hundred dollars ($67,275,500), and the said Committees have authorized and requested the said Speyer & Company to negotiate, on their behalf, with the Commission appointed by the act of Congress, of July 7, 1898, above referred to, the basis of a settlement under and in pursuance of the said Act of the indebtedness to the United States growing out of the issue of bonds in aid of the construction of said Central Pacific and Western Pacific bond-aided railroads above mentioned:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, That, in consideration of the premises, the parties hereto have undertaken, covenanted and agreed, and do hereby undertake, covenant and agree, to and with each other as follows, that is to say:

That the indebtedness to the United States growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads shall be, and it hereby is, settled upon the terms and in the manner following, that is to say:

FIRST.

The amount due the United States, being the full amount of the principal and interest, and all amounts necessary to reimburse the United States for moneys paid for interest or otherwise, is hereby found and agreed to be, on the day of the date of this agreement, the sum of fifty-eight million eight hundred and twelve thousand seven hundred and fifteen dollars and forty-eight cents ($58,812,715.48).

SECOND.

Within thirty days after this settlement shall become binding, by the submission thereof in writing to the President, and his approval thereof, the Central Pacific Railroad Company shall deliver to the Treasurer of the United States its twenty promissory notes, bearing even date herewith, payable respectively on or before the expiration of each successive six months for ten years, counting from the date of this agreement, each note being for one-twentieth of the foregoing sum of $58,812,715.48, and bearing interest at the rate of three per cent. per annum, payable semi-annually.

Provided, however, that if default shall be made in any payment of either principal or interest of any of said notes or any part thereof, then all of said notes then outstanding, principal and interest, shall immediately become due and payable, notwithstanding any other stipulation of this agreement of settlement.

Each of the said notes shall be in the following form, viz.:

$2,940,635.78.

SAN FRANCISCO, CAL., February 1, 1899.

On or before the Central Pacific Railroad Company will pay to the order of the United States of America two million nine hundred and forty thousand six hundred and thirty-five 78/100

dollars, with interest meantime at the rate of three per cent. per annum, payable semi-annually, for value received.

This is one of a series of twenty notes given by said Railroad Company to the United States of America, each for the same principal sum and bearing interest at the same rate but maturing at different dates, that is to say, on or before the expiration of each successive six months for ten years counting from the date hereof. If default shall be made in any payment of either principal or interest of any of said notes or any part thereof, then all of said notes then outstanding, principal and interest, shall immediately become due and payable.

THIRD.

The payment of principal and interest of the said notes and of the indebtedness represented thereby, shall be secured by the pledge of $58,820,000, face value, First Refunding Mortgage Four Per Cent. Gold Bonds issued by the Central Pacific Railroad Company, or its successor company having title to the aforesaid railroads, such bonds to be part of an issue hereinafter described not exceeding $100,000,000 in all, one-twentieth part of such pledged bonds to be held as security for each of said notes.

FOURTH.

The said Refunding Bonds so to be pledged as security for the payment of the said notes and interest shall be delivered to the Treasurer of the United States within a reasonable time after this settlement becomes binding, for obtaining the deposit of securities, the assent of security owners and the carrying out of such plan of reorganization or readjustment as may be necessary to enable the Central Pacific Railroad Company, or its successor company, to issue said Refunding Bonds and make the mortgage to secure the same a valid lien upon the railroads aforesaid in ac-

cordance with the requirements herein expressed. A period of ten months from the delivery of said notes is hereby declared to be *prima facie* such reasonable time, but the Central Pacific Railroad Company agrees to use its best efforts to perfect such mortgage and deliver such bonds before the expiration of that time; and, on the other hand, should such reorganization or readjustment be delayed by the pendency of judicial proceedings for the purpose of enabling the company which is to make the new mortgage to execute and deliver Refunding Bonds secured as provided herein or be delayed by adverse litigation, such period is to be correspondingly extended; provided, however, that such period shall not be extended for any cause whatever for more than three years from the date of this agreement, except with the written approval of the President of the United States.

If default shall be made in the delivery of the said bonds so to be pledged within the period hereinabove prescribed for such delivery thereof, including any extension which there may have been under the foregoing provisions, then the whole amount of the said notes then outstanding, principal and interest, shall immediately become due and payable.

The said First Refunding Mortgage Four Per Cent. Gold Bonds referred to in Article Third and this Article of this Agreement are to run for at least forty-five years, and to bear interest at the rate of four per cent. per annum, payable semi-annually, and are to be payable, principal and interest, in gold coin of the United States and are to be a part of an issue not exceeding one hundred million dollars face value secured by mortgage upon all the railroads, equipment and terminals now owned by the Central Pacific Railroad Company. Such mortgage shall be the first lien upon the said railroads, equipment and terminals, or shall be secured by deposit as collateral security therefor of at least ninety per cent. of the now outstanding First Mortgage Bonds of the Central Pacific Railroad Company of California and Western Pacific Railroad Company referred to in paragraphs First, Second and Third in the recitals to this

agreement describing the mortgages and liens on "Bond-Aided Lines," and of at least seventy-five per cent. of the aggregate of all now outstanding bonds of the Central Pacific Railroad Company and of all now outstanding bonds of the divisional companies by the consolidation whereof it was fo med, including such First Mortgage Bonds of the Central Pacific Railroad Company of California, and Western Pacific Railroad Company. In making such computation as to the amount of deposited bonds, it is agreed that the $2,038,000 Fifty-Year Five Per Cent. Bonds held as security for the outstanding Land Bonds, as above stated, shall not be counted as outstanding bonds. If any of the mortgages now securing any of the outstanding bonds aforesaid (other than the mortgage securing the Land Bonds, dated October 1, 1870, above referred to) shall be satisfied and discharged, such satisfaction and discharge thereof shall be deemed to be the equivalent of the deposit of all outstanding bonds now secured thereby as security for the said Refunding Bonds. The satisfaction and discharge of the said mortgage securing the Land Bonds, dated October 1, 1870, shall be deemed to be the equivalent of the deposit as security for said Refunding Bonds of all bonds now secured by that mortgage; provided, that the $2,038,000 Fifty-Year Five Per Cent. Bonds held as security for such Land Bonds shall either be canceled or deposited as security for such Refunding Bonds.

The mortgage securing such Refunding Bonds shall be prior in lien to any lease of the railroads of said Central Pacific Railroad Company or their appurtenances or any portion thereof, and shall be in the form agreed upon by the parties hereto, and now identified by the signature of the Attorney-General of the United States, unless the form thereof should be hereafter modified with the consent of the Attorney-General of the United States and the party of the second part, or its successor company, and the party of the third part hereto.

Upon the satisfaction of record of any existing mort-

gage any securities or funds held in any sinking fund created or existing by or under any such mortgage shall be surrendered to the Railroad Company or its successor company.

The lands granted to the Central Pacific Railroad Company of California and to the California and Oregon Railroad Company as above stated are not to be covered by the mortgage securing such Refunding Bonds. Until the delivery to the Treasurer of the United States of the Refunding Bonds to be pledged to it under Article Third hereof, secured as aforesaid, all rights of the United States in respect to said granted lands shall remain in full force and effect, but shall not be enforced unless the Central Pacific Railroad Company, or its successor company, shall make default under this agreement; and upon such delivery of said Refunding Bonds secured as aforesaid, all rights, interest and claims of the United States in, to, and in respect to, such lands shall cease and determine.

From time to time, as the principal or any part of the principal of said notes shall be paid, the United States or other holders of said notes shall return to said Railroad Company or its successors an equal amount at their face value of the said Refunding Bonds with all unmatured coupons appertaining thereto; and, as interest shall be paid upon said notes, the United States or other holders of said notes shall detach and return to said Railroad Company or its successors the coupons appertaining to said bonds representing interest thereon to the date to which interest shall have been paid upon said notes, which coupons shall thereupon be forthwith canceled.

FIFTH.

Until the Refunding Bonds hereinbefore provided for secured as aforesaid shall have been delivered to the Treasurer of the United States as security for the said notes, the lien in favor of the United States, reserved in the acts of Congress above mentioned to secure the repayment to the United States

of the above-mentioned indebtedness, as such lien now exists, shall remain in full force and effect to the extent of such indebtedness as security for the notes representing such indebtedness; and nothing herein contained shall be deemed to prevent the United States from intervening for the protection of its said lien in any legal proceedings brought to foreclose any lien on said railroads or any part thereof or otherwise.

When the Central Pacific Railroad Company or its successor company shall have delivered to the Treasurer of the United States said Refunding Bonds secured as aforesaid, then the lien in favor of the United States above referred to, as then existing, shall immediately vest in, and it is hereby, upon the happening of that event, transferred to, the Trustee of the mortgage securing such Refunding Bonds as security for the entire issue of such bonds.

SIXTH.

Until the notes to be given by the Central Pacific Railroad Company under Article Second of this agreement shall have been paid in full, principal and interest, all amounts due to the Central Pacific Railroad Company or its successor company from the United States subsequent to the date of this agreement in respect of services to the United States, upon the bond-aided lines from a point about five miles west of Ogden to Sacramento and from Sacramento to San José above referred to shall, as audited and allowed, be applied by the United States *pro rata* on account of the amounts remaining unpaid on such notes as shall not have been purchased by Messrs. Speyer & Co. hereunder, such application being first made to the payment of accrued interest thereon and thereafter on account of the principal thereof.

SEVENTH.

Messrs. Speyer & Company, within one month after the delivery to the United States of the notes referred

to in Article Second hereof, will, against delivery to them of the four earliest maturing notes, endorsed to their order by the Secretary of the Treasury on behalf of the United States without recourse to it, pay to the United States the face value of said notes, viz: Eleven million seven hundred and sixty-two thousand five hundred and forty-three dollars and twelve cents, ($11,762,543.12) with accrued interest thereon to date of payment. From and after the time when such payment shall have been made by Messrs. Speyer & Company, they shall, until the delivery of such Refunding Bonds, be entitled to share *pro rata* with the United States in the lien and all proceeds of the lien in favor of the United States to secure the indebtedness above referred to. Upon delivery of the said Refunding Bonds, Messrs. Speyer & Company shall be entitled to receive such Bonds to the amount, at their face value, of the principal of said notes then remaining unpaid which are then held by said Speyer & Company.

Within ten days after the maturity of each of said notes held by Messrs. Speyer & Company, the said Speyer & Company shall notify the Secretary of the Treasury of the United States whether such matured note and the matured interest on all the notes held by them have been paid to them or not.

Until the Refunding Bonds hereinbefore provided for secured as aforesaid shall have been delivered to the Treasurer of the United States as security for the said notes, all rights of the United States in or to or in respect of the said lien, and in or to or in respect of the lands granted as aforesaid, shall remain unaffected by the transfer of the said notes to Speyer and Company, and all right and title of the United States in the said lien, and in respect of the said lands, shall be deemed to continue in the United States as fully as if the said notes remained in its possession and ownership, save only that the said right and title shall be deemed to be held by the United States for the *pro rata* benefit of itself and said Speyer and Company, and the United States may bring and maintain any and all actions, suits and proceedings which it might have

brought or maintained, and may do any and all acts and things which it might have done had all the said notes remained in its possession and ownership, provided that all recoveries, benefits and advantages derived or obtained through or by means of such actions, suits, proceedings and acts for the enforcement of such lien and rights, shall inure to the *pro rata* benefit of the United States and said Speyer and Company. In case of any default in payment of the principal or interest of any of said notes, the United States will thereupon proceed for the enforcement of the said lien.

IN WITNESS WHEREOF, this agreement has been executed on behalf of the United States of America by Honorable Lyman J. Gage, Secretary of the Treasury, Honorable Cornelius M. Bliss, Secretary of the Interior and Honorable John W. Griggs, Attorney-General, appointed by the Act of Congress a Commission as hereabove stated; by the Central Pacific Railroad Company by its President and under its corporate seal attested by its Secretary; and by Messrs. Speyer & Company under their hands the day and year first above written. Executed in triplicate.

LYMAN J. GAGE,
Secretary of the Treasury.
CORNELIUS N. BLISS,
Secretary of the Interior.
JOHN W. GRIGGS,
Attorney General.

Approved:
WILLIAM MCKINLEY.

CENTRAL PACIFIC RAILROAD COMPANY.
BY ISAAC L. REQUA,
President.

{Central Pacific Railroad Company Seal.}

Attest:
W. M. THOMPSON,
Secretary.

SPEYER & CO.